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ABATEMENT.

1. A plea in the nature of a plea in abatement, under the act authorising that plea in cases of attachment, only denies the facts alleged in the plaintiff's affidavit as the ground of the attachment. A misnomer cannot be taken advantage of under that plea, but must be specially pleaded in abatement.—*Swan et al. v. O'Fallon et al.* 231

ACKNOWLEDGMENT.

1. See bonds and notes, 2.
2. " conveyances, 3.

ADMISSIONS.

The admissions of a party to the record, are admissible, though he has parted with all his interest in the suit. And his ceasing to be a party to the record, by death, before the admissions are offered in evidence, will not exclude them. Scott, Judge, dissenting.—*Chouteau v. Dillon.* - - - - - - - 386

ADMINISTRATION.

1. No principle of law is better settled than, that an executor or administrator is, for every purpose, the owner of the moneys of his testator or intestate, which have come to his hands. Therefore, where an administrator took a note for money loaned, in which note he was named A B., administrator, &c., the individual debts of the administrator may be set off against the note.—*Lacompte v. Sergent.* - 351
2. An executor or administrator, as such, cannot maintain an action of ejectment for lands of which his testator or intestate died siezed.—*Burdyne v. Ex. of Mackay.* 374
3. If an executor or administrator brings suit in his representative capacity, he cannot recover by virtue of any individual interest he may have in the matter in controversy. - - - - - - - - - - ib.
4. The act of the General Assembly of the territory of Missouri of January 20, 1816, (1. Territorial Laws, p. 441,) providing that "all letters of administration, *heretofore* granted, &c., shall be recorded, &c , and that the same shall not be admitted in evidence unless so recorded, was intended merely to furnish a rule of evidence, and the repeal of that law was a repeal of the rule. The act of January 12,1822, (1. T. L., p. 922, sec. 13,) as well as the subsequent laws on the subject of administration, were not intended to have a retrospective operation.—*McNair v. Dodge.* - 404
5. Possession of letters of administration by the person to whom they purport to be granted, is at least *prima facie* evidence of delivery. - - - - - ib.
6. The right of an administrator to sue is not barred by the statute of limitations. ib.
7. An execution cannot issue against the decedent's estate, on a judgment obtained against him in his life time; but all such judgments must be classed against the estate, according to the provisions of the administration law.—*Sweringen v. Adm'r of Eberius.* - - - - - - - - - - 421.
8. A writ of error will lie upon an order of the County Court, that an administrator "retain all the money of the estate, which may come into his hands, subject to the

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order of the court, for the purpose of paying all administrators and guardians, such sums as shall be found due from the estate, &c., in preference to all other demands, &c." Such an order amounts to a judgment, and is final and conclusive in its nature.—*Gamble, Adm'r. v. Hamilton, Adm'r.* - - - - - 469

9. Where an administrator dies in possession of specific property, belonging to the estate of his intestate, and it can be identified as part of such estate, the administrator *de bonis non*, is entitled to the possession of such property; but, if the property cannot be so identified, the administrator *de bonis non* must fall into the class of creditors designated by the administration law. - - - - - ib.

10. Where an allowance of a gross sum is made by the county court to executors or administrators, as compensation for their services, it must be equally divided; and one cannot retain the whole sum on the ground that the other had rendered no services. The county court, however, may, where one has performed more than his equal share of labor, allow him a compensation proportioned to his services.—*Smart v. Fisher.* - - - - - - - - - 580

AFFIDAVIT.

1. See Practice, 7.
2. " Appeal, 1—4.
3. " Bills of Exchange, 1.
4. " Pleading, 15.

AGREEMENT.

A gave his notes for the payment of the purchase money of a certain tract of land, and, at the same time, the payee agreed, under seal, that if there should be any suit concerning the land, the notes should not be paid until the same had been "entirely got rid of and cleared away," and then the expenses of the suit were to be deducted from the notes. Held: that this agreement could not be set up in bar to a suit on the notes, as it did not amount to a defeasance or a release. The party aggrieved had his action on the covenant.—*Bircher v. Payne.* - - - 462

APPEAL.

1. While the act of February 12, 1839, respecting appeals from Justices' courts, was in force, no other person than the party aggrieved could make the affidavit,—it could not be made by an agent.—*Papin v. Howard.* - - - - - 34

2. An appeal lies from the judgment of a justice of the peace, on an issue found between the plaintiff in attachment, and an interpleader, before the final determination of the cause between the plaintiff and defendant.—*Weisenecker v. Kepler, et al.* 52

3. An appeal cannot be taken until final judgment has been rendered in the cause.—*The State v. Pepper, et al.* - - - - - - - - - 348

4. The affidavit required to be made by the party appealing from the judgment of a justice of the peace, may be filed in the circuit court, after a motion to dismiss is made.—*Jamison v. Yates.* - - - - - - - - - 571

APPEARANCE.

Suit commenced by attachment, without personal service. The defendant appeared and moved to quash the attachment. Held, to be such an appearance to the action as authorised a general judgment, and a general execution thereon.—*Evans v. King.* 411

ASSIGNMENT.

1. The assignment of a bond or note may be made on a piece of paper separate from that on which the bond or note is written.—*Able & Isbell v. Shields, et al.* - 120

2. When a conditional assignment of a note is made, the law does not impose upon the maker the burden of ascertaining whether the condition has been performed, and the title of the assignee consequently extinguished. - - - ib.

3. A mortgage deed may be assigned by writing unsealed.—*Crinion et al. v. Nelson.* 466

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ATTACHMENT.

1. See Appeal, 2.
2. " Abatement, 1.
3. An attachment cannot be quashed on the ground that the facts do not authorise the issuing an attachment. If the truth of the facts, on which it is issued is controverted, it must be put in issue by a plea in the nature of a plea in abatement.—*Graham v. Bradbury et al.* - - - - - - - - 281
   The remedy by attachment is not confined to resident creditors. - - ib.
4. Suit commenced by attachment, without personal service. The defendant appeared and moved to quash the attachment. Held, to be such an appearance to the action as authorised a general judgment, and a general execution thereon.—*Evans v. King.* 411
5. When property of the defendant attached in the hands of a third person, is retained by giving bond and security for the forthcoming of the property, (according to the provisions of the 14th section of the attachment law, R. S 1835, p. 78,) the attachment continues to be a lien on the property. - - - - - ib.
6. The lien of an attachment is lost by the death of the debtor before judgment.—*Swearingen v. Adm'r. of Eberius.* - - - - - - - 421
7. An affidavit, in attachment, that the "affiant has good reason to believe, and does believe, that the defendant is about to convey his property, so as to hinder or delay his creditors," is sufficient, and it is not necessary to charge fraud in the acts alleged. It is sufficient to follow the words of the statute, and the words of themselves imply fraud. (See act concerning "Attachments," Laws of Missouri, session 1838-9, p. 6, sec. 1.)—*Curtis v. Settle.* - - - - - - - - 452
8. In a plea, in the nature of a plea in abatement, in attachment (Laws of Mo., session 1838-9, p. 6,) it is not necessary to put in issue the goodness of the plaintiff's reasons for his belief. (Scott, Judge, dissenting.)—*Dider et al. v. Courtney.* - 500

AUDITOR OF PUBLIC ACCOUNTS.

1. When an account against the State is certified to the Auditor of Public Accounts, it is only conclusive on the Auditor as to the correctness of the statements therein made, and it is the right and duty of the Auditor to decide whether the State or the county is required to pay the whole or any part of such account. It is his duty to see that no illegal demands are paid by the State.—*The State v. Hinkson.* - 353

AVERMENTS.

1. See Petition in debt, 4.
2. An immaterial averment, alleged by way of inducement merely, need not be proved, although descriptive of a written instrument.—*Ward et al. v. S. B. Little Red.* - 582

BANK OF MISSOURI.

1. See Petition in debt, 6.

BILLS OF EXCHANGE.

1. In an action against the acceptor of a bill of exchange, it is not necessary to prove his hand writing, unless it is denied by plea verified by affidavit.—*Warne v. Anderson & Thompson.* - - - - - - - - - 46
2. See Evidence, 19.
3. To entitle a party to damages upon a protested bill of exchange, drawn or negotiated within this State, the bill must express to be for "*value received.*"—*Riggs v. City of St. Louis.* - - - - - - - - - 438
4. Where the endorser of a bill of exchange boarded with the drawer, but transacted business in a different house, notice of non-payment delivered to the drawer, was held insufficient to charge the endorser. The notice should have been served on the endorser, or left at his dwelling house, or place of transacting business, or facts shown from which notice might be inferred.—*Baily v. Bank of Mo.* - - 467
5. The bona fide vendors of a bill of exchange, on which the endorsement of the payee is forged, are entitled to notice of the dishonor of the bill. To entitle the

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holder to recover from the vendors, he must use reasonable diligence, what is reasonable diligence, must depend upon the circumstances of the particular case.—*Collier & Pettus v. Budd.* - - - - - - - - - - 485

6. A bill drawn payable "in currency," is not a bill of exchange within the meaning of our statute concerning "bills of exchange," consequently the holder is not entitled to the damages allowed by the statute, in cases of dishonored bills.—*Farwell et al. v. Kennett et al.* - - - - - - - - - - 595

BILL OF EXCEPTIONS.

1. Unless all of the testimony is preserved in a bill of exceptions, this court will presume that the judgment of the circuit court, in the admission or exclusion of evidence, is correct.—*Magehan v. Orme & Speers.* - - - - - - 4

2. See New trial, 3.

3. A motion for a new, trial was argued by briefs in writing before the Judge of the St. Louis circuit court, whose commission expired before the motion was decided, or a bill of exceptions signed. A bill of exceptions was presented to his successor, with the affidavits of the witnesses sworn and examined on the trial, stating the testimony given by them respectively. The latter judge signed the bill of exceptions, and afterwards refused, on the motion of the opposite party, to strike the bill from the record. Held, that the latter judge had no right to sign the bill of exceptions without the consent of the opposite party, as the statute requires that exceptions to the opinion of the court shall be taken in the progress of the trial. (R. C. 1835, title "Practice at Law," art. 4, sec. 20, p. 464.—*Conaud et al. v. Lidell.* - - 250

4. See Practice, 27.

5. Although it is not stated in the bill of exceptions, that no other evidence, than that recited, was given, &c. Yet, if it can be clearly inferred from the proceedings, that no other evidence was given, it is sufficient.—*Gamble, Adm'r. v. Hamilton, Adm'r.* - - - - - - - - - - - 469

BONDS AND NOTES.

1. The seventh section of the act concerning "bonds and notes," (R. C. 1835, p. 105,) applies not to the form of action to be used by the holder of such note, but was intended to give the holder the same remedy against the maker, and endorser respectively, as in cases of inland bills of exchange.—*Warne v. Hill.* - 40

2. An acknowledgment of indebtedness in writing, in a specific sum, and for a valuable consideration, raises a promise to pay, and is in law a note.—*Finney v. Shirley & Huffman.* - - - - - - - - - 42

3. The assignment of a bond or note may be made on a piece of paper separate from that on which the bond or note is written —*Able and Isbell v. Shields, et. al.* 120

4. When a conditional assignment of a note is made, the law does not impose upon the maker the burden of ascertaining whether the condition has been performed, and the title of the assignee consequently extinguished. - - ib.

5. See Pleading, 7, and 13.

6. " Security, 1.

7. The word "*judgment*" in the 4th sec. of the act concerning "bonds and notes," (R. C. 1835, p. 105,) was inserted by mistake, the word "*assignment*" being intended. The maker of a note or bond cannot set off claims against the assignor, accruing after the commencement of suit by the assignee—*Frazier et. al. v. Gibson.* 271

8. A note transferred by delivery, for a valuable consideration, may be the subject of set-off. The transfer or assignment need not be in writing. - - - ib.

9. In suit by assignee of a note payable "without defalcation," but not negotiable like an inland bill of exchange, for want of the words "negotiable and payable," the payor cannot plead a set-off, though he may plead a total failure of consideration. —*Maupin et. al. v. Smith* - - - - - - - - 402

10. Where a person endorses a promissory note in blank, not being a payee, or endorsee, he is equally liable with the maker of the note, and may be sued as an original promisor, whether the note is negotiable like an inland bill of exchange or not.—*Powell et al v. Thomas.* - - - - - - - - 440

11. A bond given under a statute, but not following the words used in the act, is nevertheless valid; unless the statute prescribes a form, and declares that all bonds not taken in the prescribed form shall be void.—*Grant et. al. v. Brotherton to use &c.* - - - - - - - - - - 458

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12. The obligatory part of a bond purported that the obligors were bound in the sum of "*two thousand.*" By the condition, it appeared that the bond was taken to secure the forthcoming of property of the value of "*one thousand dollars*" Held: that the bond should read as though the word "*dollars*" were inserted after the words "two thousand." - - - - - - - - 458

13. The third section of the act concerning "bonds and notes," (R. S. 1835, p. 105,) declaring that the nature of the defence of the obligor or maker, shall not be changed by assignment, but he may make the same defence against the bond or note, in the hands of the assignee, that he might have made against the assignor, was intended to embrace equitable as well as legal defences.—*Admr of Barton v. Rector* 524

14. A transfer of a bill or note, payable to order, can only be made by the person who is legally interested, and if the person to whom it is assigned, when he took the paper, knew that the person making the transfer had no right to make it, such transfer is inoperative —*McDaniel et. al. v. Wood et. al.* - - - 543

15. The sixth section of the statute concerning "bonds and notes" makes notes drawn in the manner therein prescribed, negotiable as inland bills of exchange; it does not avoid those not drawn as therein directed, but only takes away their negotiability as inland bills of exchange, that is, the holder of such notes will take them subject to any defence the maker might have had against them, and without any right to damages in the event of their being dishonored.—*Muldrow v. Caldwell.* 563

16. Where a bond is altered or changed in a material part by the obligee—as by the erasure of the names of some of the obligors, without the assent of the others, all the obligors are discharged—*Briggs et. al. v. Glenn et al.* - - - 572

17. The courts will judicially take notice, in what light the medium or subject matter of payment of a note or bill is regarded in common understanding; and where a bill or note is made payable in "*currency*," the value of the "currency," at the time of payment, must be ascertained in the same manner as the value of any other commodity: therefore, where a bill was drawn for "two thousand dollars in currency," and protested for non-payment, it was held, that the holder could only recover the specie value of current bank notes of the nominal amount of two thousand dollars —*Farwell et. al. v. Kennett et. al.* - - - - 595

18. A bond given by one of several debtors for a debt due by simple contract, is an extinguishment of the simple contract debt, and becomes the sole debt of him who executed the bond.—*Settle et. al. v. Davidson et. al.* - - - 604

CAPIAS.

Where a capias has been improperly issued, it is no ground for quashing the writ and dismissing the suit.—*Lyon et. al. v. Harlow et. al.* - - - - 345

CERTIFICATE.

1. See Evidence, 12, and 15.

CHANCERY.

1. See Statute of Frauds, 1,

2. The 20th section of the act concerning "costs," (R. C. 1835, p. 130,) gives to courts of equity a discretion in awarding costs except in cases where the bill is dismissed: and the supreme court will not interfere with the exercise of this discretion, except, perhaps, in very palpable cases.—*Shields and Hickerson v. Bogilslo.* - - - - - - - - - - 134

3. In the recision of contracts for the conveyance of land, where the vendee has been in possession and the vendor has received the purchase money, the general rule is to consider the use of the money and the use of the land as equivalent. This rule, however, would not apply where the land was wild and wholly unproductive. ib.

4. The jurisdiction of courts of equity, in cases of nuisance, though not often exercised, is undoubted. It is founded on the right to restrain the exercise, or the erection of that, from which irreparable damage to individuals, or great public injury, would ensue. Every diminution in value, however, of the premises, is not a ground for the court to interfere; nor every species of mischief upon which an action on the case might be maintained.—*Welton et. al. v. Martin.* - - 307

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5. A. filed his bill in equity, complaining of obstructions to his mill, caused by the erection of a dam by defendants, which caused the water to flow back, and so to obstruct his mill and machinery, as to render them of little or no value; and praying for an injunction. Held that the case was not such a one, as would warrant the exercise of the restraining powers of a court of equity, by injunction. - - 307
6. In a suit in chancery, where infant defendants had not been served with process, but, upon inspection of the record, it appeared that, on their motion, a guardian, *ad litem*, had been appointed, who proceeded in the cause: The court held that the decree against the infants was not void, and therefore could not be impeached in a collateral suit.—*Day v. Kerr* - - - - - - - 426
7 A court of equity will not make a decree according to the wishes of all the parties, when such decree would be contrary to the established rules and usages of such courts. Therefore, where the complainant, who was a *cestui que trust*., filed his bill against another *cestui que trust*, and the trustee, praying a decree for a conveyance of all the land to complainant, and concluded with a prayer for general relief, the court properly decreed a conveyance to the *cestui que trusts* jointly, although the defendants were willing that the conveyance should be made according to the prayer of the bill.—*Rector v. Hutchinson et. al.* - - - - 522
8. In chancery. B. purchased a lot of ground from R., paid part of the purchase money, and gave his notes for the residue; and R. at the same time, covenanted to make a deed of general warranty as soon as the payments were completed. At the time of the sale the lot was incumbered, but this was known to B., who was not, however, placed in possession. Subsequently the lot was sold to satisfy the incumbrances. R. became utterly insolvent, and assigned the notes to others, who obtained judgment at law against B. on the notes. The prayer of the bill was for a recision of the contract—a perpetual injunction of the judgments—a cancellation of the notes, and a return of the purchase money paid. The circuit court dissolved the injunction and dismissed the bill. The supreme court reversed the decree of the circuit court and decreed according to the prayer of the bill.—*Adm'r. of Barton v. Rector et. al.* - - - - - - - - 524
9. In chancery An application was made to enter lands with the United States' Register and Receiver. The clerk in the offices, who was acting both for the Register and Receiver, delivered to the applicant an informal and void certificate of entry, and made out a formal certificate in the name of another, which he retained in his possession. On this certificate on assignment, with a blank for the name of the assignee, was executed in the name of the person mentioned in the certificate of entry. The clerk in the offices sold the land described in the certificate to one S., and inserted his name in the blank in the assignment on the certificate. S. afterwards procured a patent for the land from the United States Held, that under the circumstances S was not a bona fide purchaser: that the title he procured from the United States enured to the benefit of the applicant to enter the land, who paid the purchase money.—*Stephenson v. Smith.* - - - - - - 610

CONDITION PRECEDENT.

1. See Contracts, 6.

CONFESSIONS.

1. See Criminal Practice, 4.

CONSIDERATION.

1. Parol agreement for the conveyance of land, constitutes a valuable consideration in law, for a note given for the purchase money, where the purchaser is in possession of the land, and a deed has not been refused.—*Ott v. Garland.* - - 28
2. A. cannot sue B. either at law or in equity, on a bond made by the latter to C. to pay A. a certain sum of money, for which the obligor has received no consideration.—*Thornton v Smith and Crowther.* - - - - - 86

CONSTABLES.

1. The failure of the county court to approve of, or reject, a constable's bond, taken

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by the clerk in vacation, will not invalidate the bond. The duty enjoined upon the county court, in this respect, was intended for the security of the public, and their omission to perform such duty cannot injure the constable and his securities. — *ones et. al. v. The State to use of Blow.* - - - - - - 81

2. See Evidence, 2.

3. If the jury, in the trial of the right of property at the instance of the constable, find a verdict, the authority of the constable, in relation to the trial of the right of property, is at an end; and a subsequent finding by a jury, in another trial, contrary to the first finding, is no indemnity to the constable.—*Cunifax v. Chapman and Wills.* - - - - - - - - - - 175

CONSTITUTION.

1. See Writs, 1.

CONTINUANCE.

1. It is no ground for a continuance, that the court permitted the summons to be amended, on account of a variance between the summons and the declaration. —*Jones v. Cox et. al.* - - - - - - - - - - 173

CONTRACTS.

1. A parol agreement for the conveyance of land, constitutes a valuable consideration, in law, for a note given for the purchase money, where the purchaser is in possession of the land, and a deed has not been refused.—*Ott v. Garland.* - - - 28

2. An acknowledgment of indebtedness in writing, in a specific sum, and for a valuable consideration, raises a promise to pay, and is in law a note.—*Finney v. Shirley and Hoffman.* - - - - - - - - - - 42

3. A. shipped a quantity of lead to B., with directions to sell the same and apply the proceeds to the payment of a debt, due from A. to B. The lead was insured by B. on his own account, on being advised by A. of the shipment. While in transitu the lead was attached by C. a creditor of A. The only question was, who was the owner of the lead at the time of the attachment? Held, that A. was the owner.---*Sproule and Agnew v. McNulty et. al.* - - - - - 62

4. It seems that a consignment of property, with directions to the consignee to sell the same and apply the proceeds to the payment of a debt due from the consignor to the consignee, is not different from an ordinary case of consignment of property to a factor, with directions to sell the same on account of the consignor. The title to the property remains in the consignor until it is disposed of by the consignee. - - - - - - - - - - - - ib.

5. A. cannot sue B. either at law or in equity, on a bond made by the latter to C. to pay A. a certain sum of money, for which the obligor has received no consideration.—*Thornton v. Smith and Crowther.* - - - - - - 86

6. If a person retain a servant for a year at wages, the performance of the service is a condition precedent to the payment of wages, and the servant cannot recover them before he has performed the years' service. If he is prevented by his employer from fulfilling his contract, and is wantonly and without sufficient cause discharged before the expiration of the period for which he was hired, he is entitled to the wages for the whole period he was to serve: but if there is any fault or misconduct in him towards his employer sufficient to warrant his discharge, and in consequence thereof he is driven from the service of the person by whom he is hired, he is not entitled to any wages.—*Posey v. Garth.* - - - - - - 94

7. In the recision of contracts for the conveyance of land, where the vendee has been in possession, and the vendor has received the purchase money, the general rule is to consider the use of the money and the use of the land as equivalent. This rule, however, would not apply where the land was wild, and wholly unproductive.—*Shields and Hickerson v. Bogliolo* - - - - 134

8. When property is to be delivered, or a debt is contracted to be paid in property, on request or demand, and no place is named for the performance of the contract, a special demand at the obligor's residence, is to be averred and proved, and the allegation, "*although often requested,*" is insufficient. This

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general rule, however, must be received with some qualification, arising from the nature of the contract, and special circumstances and considerations.—*Martin v. Chauvin.* - - - - - - - - - 277

9. In determining whether a contract was a conditional sale or a mortgage, in cases where the form of the instrument is not conclusive either way, resort must be had to the circumstances attending the transaction: And if, upon a full view of the whole matter, doubts may be reasonably entertained as to the real intent of the parties, courts of equity have inclined to regard the transaction as a mortgage.—*Desloge et al. v. Ringer.* - - - - - 327

10. See Practice, 38.

11. A party cannot recover on an *implied* contract when there is an *express* contract in force.—*Christy v. Price, adm'r. of Fugate.* - - - - - 430

12. See Covenant, 4.

13. Although work may not be done according to the contract, and there is no waiver of the contract; yet, if the work is afterwards accepted, the person performing the work is entitled to recover its value.—*Thompson et al. v. Allsman.* 530

14. If, upon the sale of land by parole contract, the vendee has given his note for the purchase money, the vendor may recover the amount of the note, if he is willing to convey the land, and has done nothing which would give the vendee a right to rescind the contract.—*McGowan v. West.* - - - - - 569

15. Any contract made in consideration of an act forbidden by law, is absolutely void, and the illegality of the contract will constitute a good defence at law, as well as in equity. Therefore, where a person sold a town lot before the plat of the town was made out, acknowledged, and deposited in the Recorder's office, as prescribed by the third section of the act concerning "Towns," (R. C. 1835, p. 599,) the contract was held absolutely void.—*Downing v Ringer.* - 585

CONVEYANCES.

1. If a conveyance of property is not prohibited by some law, as violative of the rules ordained by the legislature for its disposal, or because it affects the rights of creditors or purchasers, its validity cannot be questioned.—*Wright v. Crockett.* 125

2. Where a judgment creditor seeks to avoid a conveyance on the ground of fraud, he must produce his judgment. - - - - - - - - ib.

3. The plaintiff, as a condition precedent, agreed to make to defendants a good title to certain premises. One of the deeds in the plaintiff's chain of title, was a conveyance of the premises in question by H. and his wife, acknowledged before a *justice of the peace.* H. had no interest in the premises, except in right of his wife. Held, that the deed thus acknowledged was incompetent to affect the right of the wife, and conveyed no title to the premises.—*Frost v. Pryor.* 314

4. Since the introduction of the common law, and the enactment of the statute of frauds and perjuries in 1816, lands cannot be conveyed in this State but by deed. Prior to that time, the laws of Spain, which prevailed in this country—when not abrogated by the constitution of the United States, and the laws of the territory—did not require a seal to an instrument of writing, to make it effectual for the conveyance of lands.—*Moss v. Anderson.* - - - - - 337

5. A freehold estate can only be conveyed by deed.—*McCabe v. heirs of Hunter.* 355

CORPORATIONS.

1. The statute of set-off (R. C. 1835. p. 570,) is not restricted to natural persons, but extends to corporations; and the right of set-off exists in suits by corporations before justices of the peace.—*City of St. Louis v. Rogers.* - - 19

2. Suits for the recovery of fines imposed for breaches of the by laws of a private corporation, may be brought before justices of the peace, when the amount sued for is within their jurisdiction.—*O'Brien v. Union Fire Company.* - - 58

COSTS.

1. The twentieth section of the act concerning "costs," (R. C. 1835, p. 130,) gives to courts of equity a discretion in awarding costs, except in cases where the bill is dismissed, and this court would not interfere with the exercise of

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this discretion, except, perhaps, in very palpable cases.—*Shields and Hickerson, v. Boglioto.* - - - - - - - - - - 134

2. When a non-resident commences a suit, without giving security for costs, he may be permitted to file a bond for costs, after a motion is made to dismiss for want of such security. (See Gov. of Mo. v. Rector, 1, Mo. R. p. 638; Posey v. Buckner, 3, Mo. R. 601.)—*Saowden v. McDaniel.* - - - - - 313

3. Where a suit, properly cognizable before a justice of the peace, is commenced in the circuit court, judgment for costs should be rendered against the plaintiff.—*Ashby v. Glasgow.* - - - - - - - - - 330

COUNTY COURTS.

See Administration.

COURTS.

1. See Practice, 5.

COVENANT.

1. In an action for a breach of covenant, for the conveyance of land, where the time of performance has been extended, the right of action accrues as soon as the covenantor becomes bound by his covenant to make the conveyance; and if he is not able to do so, for want of a good title to the land, it is not necessary for the covenantee to offer to rescind the contract, or to make a demand of the deed, before suit is brought.—*Dunnica, adm'r of Colgan v Sharp.* - 71

2. In this case, the court held the measure of damages to be the purchase money, with legal interest, without any deduction for the rents and profits. It is in general held, that when the vendors title is altogether defective, he can recover nothing from the vendee by way of rents and profits, because the vendee would be liable to the owner of the land for rents and profits. - - - ib.

3. Where parties mutually covenant, the one to convey and the other to perform certain acts as the consideration of the conveyance, the failure of either to perform his part of the covenant gives a right of action to the other on the covenant, although such failure may work a forfeiture of the rights of one of the parties, for the other may waive such forfeiture.—*Lucas v. Clemens.* - 367

4. Defendant covenanted with plaintiff for the payment of a certain sum of money, and at the same time, and as part of the same transaction, gave his notes to plaintiff for the payment of the money. Held: That the plaintiff had two remedies, one on the covenant and the other on the notes, and was at liberty to pursue either.—*Byrd v. Knighton.* - - - - - - 443

5. In an action on a covenant, parole testimony of the knowledge and understanding of the parties at the time of entering into the covenant, is inadmissible to control the force and effect of the covenant.—*Singleton v. Fore.* - - 515

CRIMES AND PUNISHMENTS.

1. The stealing of several articles of property, at the same time and place, constitutes but one offence; and the circumstance of several ownerships of the property, cannot increase or mitigate the nature of the offence.—*Lorton v. the State.* - - - - - - - - - - - 55

2. The fourteenth section of the ninth article of the act concerning crimes and punishments, (R. C. 1835, p. 214,) providing that the jury may find the defendant guilty of any degree of the offence inferior to that charged in the indictment, does not change, in this respect, the rule of the common law, that the allegations and proof must correspond. If such inferior degree be included in the allegations in the indictment, then the statute applies; otherwise; when the inferior degree is not so included, and is of a totally dissimilar nature from that charged in the indictment.—*The State v. Shoemaker.* - - - - - 177

3. The seventh section of the fourth article of the act concerning crimes and punishments, (R.C. 1835, p. 184,) providing, that 'Every person who shall counterfeit,

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&c. any gold or silver coin, *at the time current within this State, by law or usage*,' &c. means that the genuine coin must be current in this State at the time the counterfeit is made. 'f the genuine coin should, after the counterfeit has been made, go out of circulation, the attempt to pass the counterfeit would still be an offence under the twenty-first section of said article. - - - 177

4. A felony, under the statute of this State, is an offence for which a party, on conviction, *may* be imprisoned in the Penitentiary, and not where, on conviction, he *must* be so imprisoned.—*Johnson v. the State.* - - - - 183

CRIMINAL PRACTICE.

1. Indictment for forgery in the second degree, under the twenty-first section of fourth article of the act concerning crimes and punishments. The jury found the defendant guilty, "in manner and form as charged in the within indictment." Held, that as under this indictment the defendant could not be convicted of any inferior degree of forgery, it was unnecessary for the jury to specify in their verdict of what degree of the offence they found the defendant guilty.—*The State v. Stoemaker.* - - - - - - 177

2 In prosecutions for felonies, the omission of the similiter will not vitiate the proceedings.—*Hawkins v. the State.* - - - - - - 190

3. On the trial of an indictment against a white person, the State may give in evidence a conversation between the accused and a negro, in relation to the offence charged, when the conversation on the part of the negro is merely given in evidence as an inducement, and in illustration of what was said by the white person. But this conversation must be proved by a white person, and not by the negro. - - - - - - - - - - ib.

4. It is well settled, that confessions, induced by the flattery of hope or terror of punishment, are not admissible in evidence. But a mere observation to the accused, by the person who had her in custody, "that, in the long run, it would be better for her to tell the truth about the matter, and not any lies," was held not to bring within the above rule, a confession made by the accused afterwards in a conversation with a third person. - - - - - - ib.

5. Under the second section of the act making allowance for the transportation of convicts to the Penitentiary, approved 1st February, 1839, the guards are allowed, as full compensation for their services, one dollar and seventy-five cents per day, and eight cents per mile, and cannot claim the additional allowance of one dollar and fifty cents for every criminal. Quere, whether this court has jurisdiction in any district except that wherein the seat of government is situated, to hear and determine applications for a mandamus on the Auditor of Public Accounts.—*Ex parte Owen.* - - - - - - - - - 193

6. In a change of venue in a criminal cause, the original indictment should be retained in the office of the clerk, in the county in which it is found. A copy only should be included in the transcript of the record and proceedings.—*Ruby v. the State.* - - - - - - - - - - - 206

7. Unnecessary and useless averments in an indictment, may be rejected as surplusage —*The State v. Hamilton.* - - - - - - - - 300

8. Where several felonies are joined in the same indictment, the court will compel the prosecutor to elect on which one he will proceed; but not where misdemeanors are thus joined.—*The State v. Kirby.* - - - - - - 317

9. Petty larceny is a trespass, within the meaning of the twenty-second section of third article of the act concerning practice and proceedings in criminal cases, (R. S. 1835, p. 451,) and the name of a prosecutor must be endorsed on the indictment.—*The State v. Hurt.* - - - - - - - - - 321

10. The power of the circuit court to assess and declare the punishment in criminal cases, is merely contingent, and only to be exercised in case of a failure of duty, or disagreement of the jury It is erroneous, therefore, to instruct the jury that they "have the right and authority to return a general verdict of guilty, without assessing any punishment." (See R. S. 1835, p. 493, Title, "Practice and Proceedings in Criminal Cases," art. 7, section four)—*Fooxe v. the State.* - - - - - - - - - - 502

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DEEDS.

1. See Conveyances, 3—4.
2. " Evidence, 22.
3. A freehold estate can only be conveyed by deed.—*McCabe v. Heirs of Hunter*, 355

DEED OF ASSIGNMENT.

1. The validity of a deed of assignment cannot be questioned by those creditors who voluntarily, and with full knowledge of all the circumstances, became parties to it, although it may be void as to those creditors who are not parties to the deed.—*Burrows, et al. v. Alter, et al.*, - - - - - - 424
2. A deed of assignment void as to creditors, is valid between the parties, and does not, from being void as to creditors, create the relation of debtor and creditor between the grantor in the assignment and the assignee. The validity of the assignment cannot be tried in a court of law, upon an issue made between a judgment creditor and the assignee, garnisheed on an execution, under the provisions of the eighth section of the act concerning "executions." (R. S. 1835, p. 254.)—*Van Winkle, et al. v. McKee, et al.* - - - - 435
3. The assent of creditors will be presumed to a deed of assignment made for their benefit, containing no stipulations or conditions prejudicial to their interests. Therefore, where such a deed was made for the benefit of certain preferred creditors, who were named as parties to the deed, but did not execute the same, their assent was presumed, they not being required to execute the deed before receiving the benefit of its provisions.—*Duvall, et al. v. Raisin, et al.* 449
4. Endorsers are viewed by courts as creditors, and a deed of assignment made for their security is valid, although no payments had been made by them at the time of the execution of the deed. - - - - - - - ib.
5. The neglect or delay of the assignee in making out a schedule of assets and liabilities, referred to in the deed as part thereof, will not render the deed inoperative. - - - - - - - - - - - ib.

DEFAULT.

1. If a party, by negligence, suffers a judgment by default to go against him, it will not be set aside to admit a defence which the party might have made had he used due diligence —*Wimer v. Morris*, - - - - - - - 6
2. Something more than a mere affidavit of *merits* is necessary to authorize the circuit court to set aside a judgment by default. The "good cause," required to be shown, must not only be a meritorious defence, but the exercise of all due diligence by the party.—*Greene v Goodloe.* - - - - - 25

DEPOSITIONS.

1. See Practice, 25.

EJECTMENT.

1. See Spanish Grants, 2, 5, 10.
2. An executor or administrator, as such, cannot maintain an action of ejectment for lands of which his testator or intestate died seized.—*Burdyne v. Executor of Mackay.* - - - - - - - - - - - 374
3. Ejectment. Plaintiff claimed under a patent from the United States, dated 15th June, 1826. The defendant claimed under the act of Congress of July 4th, 1836. Held: that as the latter act expressly excepted lands that had been surveyed and sold by the United States, the patent, whether valid or not, must prevail against the defendant, claiming under the act of Congress. The act of July 4th, 1836, was clearly a gratuity, and as such, Congress chose to prescribe the terms on which their bounty could be obtained.—*Sarpy v. Papin*, 503

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EMANCIPATION.

1. See Slaves, 1 and 2.

ERASURE.

1. An erasure cannot be proved by the opinion of a witness founded on inspection of the instrument, however skilled he may be in judging of handwritings. Whether the instrument were erased or not, is a fact for the jury to find on inspection of the paper and evidence —*Swan & Deming v. O'Fallon & Polk*, - 231
2. Where a bond is altered or changed in a material part by an obligee, as by the erasure of the names of some of the obligors, without the assent of the others, all the obligors are discharged.—*Briggs, et al v. Glenn, et al.* 572
3. Where a credit has been endorsed on a bond or note, and is afterwards erased, it devolves upon the obligee or payee to account for the erasure. The endorsement, if made with the consent of the obligee or payee, amounts to an admission of payment, and if not made with his consent, it devolves on him to prove that fact.—*M'Elroy v. Caldwell*, - - - - - - - - 587

ESCAPE.

A sheriff will not be liable for an escape, under the fifty-second section of the act concerning executions, (R. C. 1835, p. 260,) if, at the time of the escape, he is deviating from the line of his duty, at the request of the plaintiff, or his agent, as taking the defendant to some particular place for the purpose of obtaining security for part of the debt, even if the prisoner escape by the negligence of the sheriff.—*The State to use, &c. v. Woods et al.* - - - - - - - - - 536

EVIDENCE.

1. In an action against the acceptor, of a bill of exchange, it is not necessary to prove his hand writing, unless it is denied by plea verified by affidavit.—*Warne v. Anderson & Thomjson.* - - - - - - - - - - 46
2. Action of debt on a constable's bond. The bond was handed to the clerk of the county court in vacation, who received the same, endorsed it "filed," subscribed his name thereto, and filed it in his office, where it has ever since remained: Held, to be sufficient evidence of the approval of the bond by the clerk, for the statute does not declare that his approval shall be expressed in any particular manner.—*Jones et al. v. The State to use of Blow.* - - - - - - - - 81
3. See Spanish grants, 7.
4. See Practice, 15–16–17.
5. Whenever the credit of a witness is to be impeached by proof of any thing he has said, or declared, or done in relation to the cause, he is first to be asked, upon cross-examination, whether he has said, or declared, or done that which is intended to be proved —*Aide & Isbell v. Sneles et al.* - - - - - - - - 120
6. Where a judgment creditor seeks to avoid a conveyance on the ground of fraud, he must produce his judgment.—*Wright v. Cockett.* - - - - - - 125
7. A subscribing witness cannot prove the execution of an instrument of writing, (being the foundation of the action,) which is denied by plea, verified by affidavit, without having the instrument before him, at the time of deposing. The witness cannot, without inspection, swear to the genuineness of his own hand writing, or that of the obligor.—*Neale v. M'Kinstry.* - - - - - - - - 128
8. A. conveyed certain property to B. in trust to secure to C. a debt due him from A. in an action by B against D for taking the property, A. was held incompetent to prove that the property taken was the same that he had conveyed to B., as A. had a residuary interest in the property.—*Dameron v. Wilkins* - - - - 138
9. If the plaintiff, in an execution issued on a judgment rendered by a justice of the peace, wishes to show himself a judgment creditor, for the purpose of contesting the validity of a deed, he must produce the whole transcript of the justice's docket, that it may appear not only that there was an execution, but a judgment to warrant the execution, and other previous proceedings to warrant the judgment. - - ib.

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10. See Pleading 4.
11. See Criminal practice, 3 and 4.
12. The certificate of the presiding judge of a court of record in another State, that the attestation of the clerk of such court, is in due form, and by the proper officer, is conclusive evidence that the certificate contains all the facts, which, by the laws of that State, it should have certified.—*Rennick v. Chloe.* - - - - 197
13. See Slaves, 1 and 2.
14. In a suit against securities, on a bond, the principal debtor is not a competent witness for the securities, even though he has received from them a bond of indemity against the costs of the suit. The principal is interested in the event of the suit, under the statute concerning securities. (R. C. 1835, title, "securities," sec. 4, p. 574.)—*Stinson v. Forrest et al* - - - - - - - - 209
15. It is not necessary that the certificate of a clerk of a court, should state that the court was a court of record. The seal of the court annexed to the certificate, raises the presumption that it is a court of record, and it lies upon the party objecting to rebut that presumption.—*Steamboat Thames v. Erskine & Gore.* - - 213
16. Where no objections were made to the reading of depositions until they were offered in evidence and then they were objected to on the ground that there was no proof that the witnesses were not within reach of the process of the court, the circuit court properly allowed that objection to be removed, by the introduction of other testimony.—*Lapp v. Chouteau.* - - - - - - - - 224
17. An erasure cannot be proved by the opinion of a witness founded on inspection of the instrument, however skilled he may be in judging of handwritings. Whether the instrument were erased or not was a fact for the jury to find on inspection of the paper and evidence.—*Swan & Deering v. O'Fallon and Polk.* - - - 231
18. A person named in the writ as a defendant, but upon whom the writ is not served, is no party to the action, and his liability to the plaintiff, in the contract, is not affected by the result of that action. He is, therefore, a competent witness for the defendant, if released from his liability for contribution.—*Sanders v. Gratz.* - 261
19. In suits on negotiable instruments, a party to the instrument may be permitted to testify if he is not disqualified by interest. The maker of a note is, therefore, a competent witness for the endorser in an action by the endorsee against the endorser, the maker having no interest in that suit, being liable in either event. This is not the case, however, if he is an accommodation endorser, in which case he is regarded as a surety, and if the endorsee succeeds against him, he is entitled to recover of the maker not only the amount of the note, but the cost he has been compelled to pay. Unless, therefore, the maker is released from his liability he is incompetent.—*Bank of Mo. v. Hulett et al* - - - - - - 273
20. Action for a forcible entry and detainer. Plaintiff proved that he had been in possession, and had delivered the same to L. to keep for him, and that afterwards he found defendant in possession, who refused to deliver up the same, and then proposed to prove that defendant had paid L. $30 to deliver possession of the premises to defendant. Held by the court, that this evidence was properly excluded. That there was no evidence on the record of any fraud on the part of defendant, and that, for any thing appearing upon the record, the defendant might have believed that L. was possessed of the premises in his own right.—*Moore v. Agee* - - 289
21. See Principal and agent, 1-2.
22. Under the provisions of the act of February 1, 1839, concerning evidence, (L. of Mo. session 1838-9, p. 41.) it is not necessary to call the subscribing witnesses to the deed to prove the identity of the grantor, or to account for their absence; nor is their presence required by the rule that the best evidence should be produced. The proof of the identity of the grantor in a deed, by a person who is not a subscribing witness, is not evidence inferior to the proof of the fact by one who has attested it as a witness.—*Massey v. Patterson.* - - - - - - - - 337
23. See Spanish grants, 10
24. When the statements of the opposite party are offered in evidence, whatever was stated in the same conversation, whether adverse to the interests of the party offering the evidence or not, is also admissible.—*Rogers v. Hardy & Buckner.* 343
25. A receipt given by a member of a firm in his own name, without reference to the firm, is not necessarily evidence that the money was paid in discharge of a debt due to the firm. - - - - - - - - - - ib.
26. The act of 14th January, 1839, allowing a party to dismiss his suit in vaca-

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tion, not containing any provision respecting the preservation of the evidence of such dismissal, the circuit courts may provide by rule for the preservation of such evidence. In the absence of any such rule, the entry of the clerk in a book kept by him for that purpose, or on a paper filed in the cause, would be sufficient evidence of such dismissal.—*Shoults v. Baker*, - - - 350

27. The admissions, of a party to the record, are admissible, though he has parted with all his interest in the suit. And his ceasing to be a party to the record, by death, before the admissions are offered in evidence, will not exclude them. (Scott, Judge, dissenting.)—*Dillon v. Couteau*, - - - - - 386

28. Possession of letters of administration by the person to whom they purport to be granted, at least *prima facie* evidence of delivery.—*McNair v. Dodge*, 494

29. A partner of the defendant is not a competent witness on the part of the plaintiff, to prove that the defendant was a partner of the witness at the time the cause of action accrued, as he is interested in establishing the fact that others are jointly liable with him, and thereby diminishing his own responsibility—*Dixon, et al. v. Hood*, - - - - - - - 414

30. The declarations, acts, or admissions of one partner, are not evidence of the partnership, against other members of the firm. - - - - ib.

31. Under the plea that a deed was obtained by fraud, covin, and misrepresentation, the only evidence of fraud that can be received, is that in relation to the execution of the instrument. Fraud in the consideration, or a partial or total failure of consideration, is no defence to an action at law upon a bond.—*Burrows, et al. v. Alter, et al.* - - - - - - - - 424

32. In suits commenced before a justice of the peace, where the plaintiff proves his demand by the defendant, the latter will not be allowed at the same time to prove, by his own testimony, a set off claimed by him against the demand. The defendant is placed in the same situation, by the statute, in which a plaintiff is, who seeks to establish his demand by the oath of the opposite party; before either can prove his demand, or set off, by his own oath, the other party must be called upon to testify. (See Justices' Courts, art. 5th, sec. 16, R. S. 1835, p. 361.)—*Musick v. Musick*. - - - - - - - 495

33. In an action on a promissory note, given for the price of an article sold the defendant, in case of a fraud or breach of warranty, may give evidence, showing the true value of the article sold, in diminution of the stipulated price—*Wade v. Scott*. - - - - - - - - - - 509

34. In an action on a covenant, parol testimony of the knowledge and understanding of the parties at the time of entering into the covenant, is inadmissible to control the force and effect of the covenant.—*Singleton v Fore*. - - 515

35. See Petition in Debt, 7.
36. See Partnerships, 10, 11.
37. " Averment, 2.

EXECUTION.

1. An improvement on public lands is not subject to execution. It is not such an interest in land as is contemplated by the act regulating executions.—*Hatfield v. Wallace*. - - - - - - - - - - - 112

2. The 14th section of the act relating to executions, (R. C. 1835, p. 255,) exempts from execution the necessary tools and implements of trade of any mechanic *only* whilst carrying on his trade. If a mechanic conceives the design of absconding, and ceases the prosecution of his trade, the moment he leaves his trade, his tools and implements become subject to execution.—*Davis v. Wood*. 162

3. The specifications of property exempted from execution in the 15th section of the act concerning executions, (R. S. 1835, p. 255,) are cumulative. Therefore, if a mechanic is the head of a family, the statute, in addition to his tools, exempts from execution the same property that is exempt when owned by the head of a family who is not a mechanic.—*Harrison v. Martin*. - - 286

4. When more property is sold by the sheriff, under execution, than is sufficient to satisfy the execution, and the property could have been sold in parcels, the court will set aside the sale on motion, but the motion must be made by a party whose rights are affected by the sale.—*Hicks, et al v. Perry*. - - 346

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5. An execution cannot issue against a decedent's estate, on a judgment obtained against him in his life time; but all such judgments must be classed against the estate, according to the provisions of the administration law.—*Sweringen v. Administrator of Eberius.* - - - - - - - - 421
6. The validity of the assignment cannot be tried in a court of law, upon an issue made between a judgment creditor and the assignee, garnisheed on an execution, under the provisions of the eighth section of the act concerning "executions." (R. S. 1835, p. 254.)—*Van Winkle, et al. v. McKee, et al.* - - - 435
7. See Escape.

FORCIBLE ENTRY AND DETAINER.

1. The act giving the action for a forcible detainer, contemplates a case in which the plaintiff has been in lawful possession, and in which the defendant, or those under whom he claims, have peaceably obtained that possession, and held over after a demand made in writing.—*Blount & Baker v. Wiuright.* 50
2. In every case in which the action for a forcible detainer is given by the statute, the person to whom the action is given is supposed to have been in possession of the premises, and the defendant to have come into the possession under him, either immediately or mediately. A purchaser at sheriff's sale, who has never been in possession, cannot maintain this action.—*Hatfield v. Wallace.* - - - - - - - - - - - 112
3. In an action under the act concerning "forcible entry and detainer," evidence concerning the right of property," to the land in controversy, is inadmissible, —*Stone v. Milot.* - - - - - - - - - 153
4. In an action under the statute concerning "forcible entry and detainer," by a settler on the lands of the United States," against one who had settled on an unenclosed part of the tract in controversy, bare possession, without any right of pre-emption, will not bring the plaintiff within the provisions of the twenty ninth section of the act.—*Sloane v. Moore.* - - - - - 170
5. See Evidence, 20.

FRAUD.

1. Where a judgment creditor seeks to avoid a conveyance on the ground of fraud, he must produce his judgment.—*Wright v. Crockett.* - - 125
2. Possession of Personal property by the vendor after the sale, or by the mortgagor after the mortgage, is not fraudulent *per se*, as against creditors and purchasers. The purchaser may, in all cases, show why he left the vendor in possession of the property, and that such possession is bona fide. (The cases of Rocheblave v. Potter, 1 Mo. R. 561; Foster v. Wallace, 2 Mo. R. 231; Sibley v. Hood, 3 Mo. R. 290; and King v. Bailey, 6 Mo. R. 576, so far as they conflict with this decision are overruled.)—*Shepherd v. Trigg.* - - 151
3. Fraud in fact, is a question with the jury, and any secrecy in the transaction, or circumstances indicative of concealment, or of a design to give one the appearance of being the owner of property which he does not own, are circumstances of fraud. But the jury are to weigh such evidence, and may or may not deduce fraud in fact therefrom.—*Ross v. Crutsinger.* - - 245
4. See Pleading, 18.
5. Under the plea that a deed was obtained by fraud, covin, and misrepresentation, the only evidence of fraud that can be received is that in relation to the execution of the instrument. Fraud in the consideration, or a partial or total failure of consideration, is no defence to an action at law, upon a bond.—*Burrows, et al. v. Alter, et al.* - - - - - - - - 424
6. See Evidence, 33.

GAMING.

1. See Pleading, 4, 5, and 6.
2. The third section of the act to restrain gaming, (R. C. 1835, p. 291,) providing that "all *judgments*, &c., when the consideration is money or property, won at

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any game or gambling device, shall be void," extends only to judgments by confession; where the judgment was obtained by due process of law, no defence having been made, or an unavailing defence, the judgment cannot be set aside or vacated by a bill in equity, or on motion.—*Wilkerson v. Whitney* 295

GUARDIAN AND WARD.

See Landlord and Tenant, 1.

HUSBAND AND WIFE.

See Conveyances, 3.

INDICTMENT.

1. Indictment for forgery. The indictment charged the counterfeit coin to be in imitation, &c., of coin, &c., of "the State of Missouri," "called a Mexican dollar." Held: that the indictment was defective, as the words "State of Missouri," were contradictory and repugnant to the subsequent part of the description, and being descriptive of a material part of the offence, could not be rejected as surplusage.—*The State v Simmaker.* - - - - - 177

2. In an indictment framed under the 34th section of 2d article of the act concerning crimes and punishments, the assault was described as being made with a knife, and the wound inflicted was termed a *stab*. Held: that the word *stab* was not used as a technical term, but must be construed in its ordinary acceptation.—*Ruby v. The State.* - - - - - - - - - 200

3. An indictment, under the 8th section of the 8th article of the act concerning "crimes and punishments," (R. C. 1835, p. 201.) for "lewdly and lasciviously" abiding and cohabiting, it is sufficient to charge the offence as having been committed on a certain day, and it is not necessary to charge the offence with a continuando. It seems that proof of a single act of such criminal intercourse would not of itself be sufficient to sustain the indictment.—*Wilson v. The State* - - - - - - - - - - - 244

4. In an indictment for perjury, against a party to a suit, it is necessary to show by proper averments, that he was sworn under circumstances which authorized his being sworn as a witness in the cause. (R. S. 1835 title, "Justices' Courts," p. 321.)—*The State v. Hamilton* - - - - - - 300

5. Unnecessary and useless averments in an indictment, may be rejected as surplussage. - - - - - - - - - - ib.

6. An indictment under the act concerning "groceries and dram shops," (Laws of Mo., session 1840-1, p. 82.) for keeping a "grocery" without a license, should contain an averment that the liquors sold were "not to be drank at the place of sale." If the liquors were sold to be drank at the place of sale, the vendor would be indictable for keeping a "dram shop" without a license, without regard to the quantity sold, and could not be indicted for keeping a "grocery."—*The State v Auberry.* - - - - - - - - 301

INJUNCTIONS.

See Chancery, 5.

INSTRUCTIONS.

1. If the instructions given by the court are consistent with each other, and, taken together, constitute a correct exposition of the law applicable to the case, this court will not reverse the judgment, because a single instruction, taken by itself, is defective. Whilst erroneous instructions cannot be cured by subsequent instructions that are correct, a defective instruction, or an instruction that is not true under all contingencies, and is therefore not applicable to all the facts before the jury, may be supplied by the instructions that follow.—*Neale v. McKinstry.* - 123

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2. The judgment of the circuit court, will not be reversed on account of an erroneous instruction, when it is apparent from the record, that such instruction could not have been prejudicial to the party complaining.—*Finney et al. v. Allen.* 416

INSURANCE.

1. Action of assumpsit on a policy of insurance stipulating that "endorsements on this policy to be the evidence of property, at the risk of the company under the same" Held: That the insured could only recover where the endorsement on the policy was made previous to the loss.—*Edwards v. S. Louis Per. Ins. Co.* 382
2. A departure from the usual course of the voyage of a steamboat, for the purpose of saving *property*, is a deviation which discharges the insurer.—*Settle & Bacon v. St. Louis P. Ins. Co.* - - - - - - - - - 379

JAILS.

1. Each county is required to keep a good and sufficient jail, and there is no law subjecting the State to any charge for guarding county jails.—*The State v. Hinkson.* - - - - - - - - - - 353

JUDGMENT CREDITOR.

1. Where a judgment creditor seeks to avoid a conveyance on the ground of fraud, he must produce his judgment.—*Wright v. Crockett.* - - - - - 125
2. If the plaintiff in an execution issued on a judgment rendered by a justice of the peace, wishes to show himself a judgment creditor, for the purpose of contesting the validity of a deed, he must produce the whole transcript of the justice's docket; that it may appear not only that there was an execution, but a judgment to warrant the execution, and other previous proceedings to warrant the judgment.—*Dameron v. Williams.* - - - - - - - - - 138

JUDGMENTS.

1. See Evidence, 6.
2. " Justice's courts, 5.
3. A judgment rendered against a party who had no notice of the proceedings, is utterly void.—*Smith v. Ross and Strong.* - - - - - - 463
4. See Lien 2-3.
5. A memorandum made by the clerk at the foot of a judgment, that it should bear ten per cent. interest, forms no part of the judgment, and if the clerk has erred in making the memorandum, the error may be rectified on motion of the circuit court.—*Fugate v. Glasscock.* - - - - - - - - - 577

JURISDICTION.

1. See Justice's Courts, 3, 7, 8, and 9.
2. " Criminal Practice, 5.
3. " Patent, 2, and 3.

JURIES.

1. Juries are not the judges of the law; they are to decide according to the evidence, as they receive it from witnesses, and the law as delivered to them by the court.—*Hardy v. The State.* - - - - - - - - - 607

JUSTICE'S COURTS.

1. See Corporations, also set-off, 1.
2. " Appeal, 1.
3. Suits for the recovery of fines imposed for breaches of the by-laws of a private

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corporation, may be brought before justices of the peace, when the amount sued for is within their jurisdiction.—*O'Brien v. Union Fire Co.* - - - 38

4. An appeal lies from the judgment of a justice of the peace, on an issue found between the plaintiff in attachment, and an interpleader, before the final determination of the cause between the plaintiff and defendant.—*Weisenecker v. Kepler et. al.* - - - - - - - - - - - 52

5. The 2nd section of the 6th article of the act relating to justice's courts, (R. C. 1835, p. 262.) prescribing the manner of taking confessions of judgments, relates to confessions taken where there is no process.—*Davis v Wood.* - - 162

6. See Writs, 1.

7. Justices of the peace have no jurisdiction of actions on penal bonds, except constable's bonds, when the demand does not exceed ninety dollars.—*Wimer v. Brotherton.* - - - - - - - - - - 264

8. Two or more suits on several demands, each of which is within the jurisdiction of a justice of the peace, but united exceed the jurisdiction of a justice, may be prosecuted at the same time, and cannot be consolidated.—*Martin v. Chauvin.* 277

9. Justices of the peace have no jurisdiction in actions on notes exceeding ninety dollars, to be paid in *property.* - - - - - - - - ib.

10. Where suit is instituted before a justice of the peace, on two notes, both in favor of the same plaintiff, and against the same defendant, and the notes united, do not exceed the jurisdiction of a justice, he has no authority to make two cases of the one cause of action; nor has he any authority to give judgment on the one note, and continue the cause as to the other note.—*Mass v. Brown.* - - - 305

11. See Practice, 44.

12. In suits commenced before a justice of the peace, where the plaintiff proves his demand, by the defendant, the latter will not be allowed at the same time, to prove, by his own testimony, a set-off claimed by him against the demand. The defendant is placed in the same situation, by the statute, in which a plaintiff is, who seeks to establish his demand by the oath of the opposite party, before either can prove his demand or set-off by his own oath, the other party must be called upon to testify. (See justice's courts, art. 5th, sec. 16, R. S. 1835, p. 361.)—*Musick v. Musick.* - - - - - - - - - - - 495

13. See Lien, 2 and 3.

LANDLORD AND TENANT.

1. Defendant held the premises in question under a lease for eight years, not yet expired, made by the guardian of the plaintiff's wives, under the direction of the county court, before their intermarriage with plaintiffs. After the expiration of the guardianship and before the expiration of the lease, plaintiffs had accepted rent from defendant. Held, that whether the lease was voidable or void, the acceptance of rent by the parties, after the expiration of the guardianship, raised an implied tenancy from year to year, which required notice to quit.—*Tiernan v. Johnson.* 43

2. See Forcible entry and Detainer, 1.

LACHES.

Laches will not be imputed to the State.—*Parks v. The State.* - - - 194

LAWS.

See Practice, 5.

LIEN.

1. When property of the defendant attached in the hands of a third person, is retained by giving bond and security for the forth coming of the property, (according to the provisions of the 14th section of the attachment law, R. S. 1835, p. 78,) the attachment continues to be a lien on the property.—*Evans v. King.* - - 411

2. Ejectment. Plaintiff claimed under one L. by deed dated Feb. 28th, 1834. Defendant claimed as purchaser at sheriff's sale, by virtue of an execution issued on

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a transcript of a judgment against L., filed in the clerk's office on the same day, i. e. Feb. 28th, 1834. It appeared that the deed was filed one hour and twenty minutes after the transcript was filed. Held: That the purchaser at sheriff's sale must prevail, as the lien attached from the time of the filing of the transcript.—*Jones v. Luck.* - - - - - - - - - - - 551

3. In order to acquire a lien on the real estate of the defendant, it is only necessary to file in the clerk's office a transcript of the judgment, and not a complete copy of the justice's docket relating to the cause. - - - - - ib.

LIMITATIONS.

1. The State is not included in, nor barred by any act of limitation, unless expressly named therein.—*Parks v. The State.* - - - - - - - 194

2. It is a general and well established principle of law, that in contracts, the time of limitation depends on the law of the country in which the action is brought, and not on the law of the country where the contract is made. For although contracts are to be construed according to the laws of the country in which they are made, or according to the laws of that country, in reference to which they are made, yet the remedy on them must be conformable to the laws of that country in which the remedy is sought.—*King v. Lane.* - - - - - - 241

3. The saving of actions against persons out of the State in the 7th sec. of 2nd art. of the statute of "Limitation," (R. C. 1835, p. 394,) extends to foreigners, or those who have resided altogether out of the State, as well as to citizens of the State, who may be absent for a time. Whether the defendant be resident of this state, and occasionally absent, or whether he resides altogether out of the state, is not material. If the cause of action arises abroad, it is sufficient to save the statute from running in favor of the party to be charged, until he comes within the state ib.

4. The right of an administrator to sue, is not barred by the statute of limitations.—*McNair v. Dodge.* - - - - - - - - - 404

5. The term "*beyond sea*," in the first section of the statute of "Limitation," of 1825, means "out of the state.—*Shreve v. Adm'r. of Whittlesey.* - - - 473

MARRIAGE CONTRACTS.

The 5th sec. of the act of Dec. 22, 1824, concerning "marriage contracts," (R. S. 1825, p. 526,) was not intended to embrace marriage contracts made before the change of government, i. e. 10 March, 1804.—*McNair v. Dodge.* - - 404

MILLS AND MILL-DAMS.

1. See Nuisance, 1, 2.
2. " Chancery, 5.

MISNOMER,

1. See abatement, 1.
2. The omission of the initial letter of a middle name is not a misnomer or variance.—*Smith v. Ross & Strong.* - - - - - - - 463

MORTGAGES.

1. A mortgage deed, under the statute of this State, being made only to secure the payment of a debt, may be assigned by writing unsealed.—*Crinion, et al v. Nelson.* - - - - - - - - - - 466

2. If a creditor, whose debt is secured by mortgage, proceeds under the act concerning mortgages, and the whole of the mortgage premises are sold in satisfaction of part of the debt, he cannot afterwards proceed against the same lands in the hands of a purchaser, in order to obtain payment of a part of the same debt, thereafter becoming due.—*Buford, et al. v. Smith.* - - - - 489

3. A. sold to B. a mare, delivered possession, and gave an absolute bill of sale.

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B. at the same time executed, on a separate paper, a defeasance giving to A. the right to redeem the mare, on the payment of a certain sum, on a certain day. Held: to be a mortgage, and not a pledge, and that the title of B. became absolute *at law*, on the failure of A. to redeem within the prescribed time.—*Williams v. Rorer.* 556

NAME.

A middle letter between the christian and surname, is no part of the name.—*Orme v. Shephard.* 606

NEW TRIAL.

1. Surprise in matter of fact, when due diligence has been used, may be good cause for a new trial, but not surprise in a matter of law.—*Hite v. Lenhart, et al.* 22
2. See Practice, 11 and 12.
3. A new trial will not be granted unless the motion for the new trial, and the grounds upon which it is asked, are preserved in a bill of exceptions.—*Bencist and Hackney v. Powell and Wilson.* 224
4. A second new trial can only be granted for the reasons enumerated in the statute, viz. when the triers of the fact shall have erred in a matter of law, or when the jury shall be guilty of misbehavior.—*Humbert v. Eckert.* . 259
5 A new trial will not be awarded, when it is evident that the party applying for the same could derive no benefit thereby.—*Furguson v. Turner.* . 497

NON-SUIT.

A writ of error will not lie on a judgment of non-suit; but the party must move to set aside the non-suit, and preserve the evidence and proceedings in the cause in a bill of exceptions.—*Atkinson v. Lane.* 403

NOTICE.

1. See Practice, 1.
2. " Landlord and Tenant, 1.
3. A judgment rendered against a party who had no notice of the proceedings, is utterly void.—*Smith v. Ross & Strong.* 463
4. See Bills of Exchange, 4, 5.

NUISANCE.

1. To divert or obstruct a private water course, is, by the common law, a private nuisance; and although obstructions to private water courses are declared by statute, (R. S. 1835, title "Mills and Mill dams," sec 23, p. 408.) public nuisances; yet that statute is merely cumulative, and made for the sake of the remedy, and not with a view to alter or affect the remedies afforded by the common law to individuals for such injuries.—*Welton, et al. v. Martin.* . 307
2. When a public nuisance causes a special damage to an individual, he has the same remedies for that damage, and none other, which he would have had, if the injury had proceeded from a private nuisance. . . . . ib.

OFFICIAL BONDS.

1. See Security, 1.
2. " Pleading, 18.

PARTITION.

1. In proceedings at law in partition, the plaintiff or petitioner must show in him-

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self a legal title to the premises sought to be divided.—*McCabe v. Heirs of Hunter.* - - - - - - - - - - - 355

2. In proceedings under the act concerning partition of lands, the interests of all the claimants of the land should be set forth and proved.—*Millington v. Millington.* - - - - - - - - - - 446

PARTNERSHIP.

1. Money borrowed by a partner in the name of the firm, becomes a partnership debt, unless the leader knew, or had reason to believe, that the borrower wanted the money for his own private use, or the transaction was out of the ordinary course of business.—*Bascom, impleaded with Mylins, v. Young.* - 1

2. Where parties enter into articles of co-partnership for a certain period, and thereafter transact business as co-partners, they are to be held and considered as such, so far as the rest of the community is concerned, until the community are duly notified of the dissolution.—*Thurston v. Perrins, et al.* - 29

3. If an acceptance be given in the name of the firm by one of the partners for his own separate use, and that fact is not known to the other party, the firm is bound by the acceptance.—*Potter v. Lilon.* - - - - - 228

4. A receipt given by a member of a firm in his own name, without reference to the firm, is not necessarily evidence that the money was paid in discharge of a debt due to the firm.—*Rivers v. Hardy & Buckner.* - - - - - 348

5. A partner of the defendant is not a competent witness on the part of the plaintiff, to prove that the defendant was a partner of the witness at the time the cause of action accrued, as he is interested in establishing the fact that others are jointly liable with him, and thereby diminishing his own responsibility.—*Lisor, et al. v. Hord.* - - - - - - - - - 414

6. The declarations, acts, or admissions of one partner, are not evidence of the partnership, against other members of the firm. - - - - - ib.

7. The first section of the act of February 13, 1839, providing, that in actions founded on contract, and instituted against several defendants, the plaintiff may have judgment against such of the defendants as shall have been proven to be parties to the contract, is applicable to suits against partners, where a note has been executed by one, in the name of the firm, without the express or implied authority of the other.—*Finney, et al. v. Allen.* - - - - 416

8. See Petition in debt, 7.

9. After the dissolution of a partnership, one partner cannot draw, accept, or endorse bills to bind his co-partner.—*McDaniel, et al. v. Wood, et al.* - 543

10. In an action by partners to recover a partnership demand, it will be incumbent on the plaintiffs to prove that they were partners at the time of the contract, and the common reputation of the neighborhood is insufficient to prove such partnership.—*Lockridge, et al. v. Wilson.* - - - - - 560

11. Partnerships are usually proved by the oral testimony of clerks, or other agents or persons who know that the alleged partners have actually carried on business in partnership. - - - - - - - - ib.

PATENT.

1. A patent may be void, because it is issued without any authority of law, or by an officer not authorized by law; or, because the title was not in the United States: or, perhaps, where the land has been expressly reserved from sale; but the validity of the patent cannot be impeached by one resting on a mere naked possession.—*Strpy v. Papin.* - - - - - - - - 503

2. Although the validity of a patent cannot be questioned in a collateral proceeding, yet, if one enters lands of the United States with the money of another, in his own name, and procures a patent for the same from the general government, a court of equity will decree the title to him to whom the money belonged. Such a proceeding does not invalidate the patent, but recognizes its validity.—*Stephenson v. Smith.* - - - - - - - - 610

3. The State courts have jurisdiction of causes instituted for such purposes, and a decree compelling the fraudulent patentee to convey to the equitable owner, does not violate the compact between this State and the United States, by

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which the State binds herself to abstain from passing any law interfering with the primary disposal of the soil by the United States, and with any regulation Congress may find necessary for securing the title in such soil to the *bona fide* purchaser. - - - - - - - - - - - 610

PENAL BONDS.

See Justices' Courts, 7.

PETITION IN DEBT.

1. Petition in debt may be maintained by the holder of a negotiable promissory note, within the meaning of the sixth section of the act concerning "bonds and notes," (R. C. 1835, p. 105,) against the maker thereof.—*Warne v. Hill.* - 40

2. The seventh section of the above act applies not to the form of action to be used by the holder of such a note, but was intended to give the holder the same remedy against the maker and endorser, respectively, as in cases of inland bills of exchange. - - - - - - - - - - - ib.

3. More than one bond or note may be set out in a petition in debt. The several bonds or notes may be considered as several counts.—*Jones v. Cox et al.* - 173

4. Petition in debt cannot be maintained where an averment is necessary to show the right of action; but if an averment is made where it is wholly unnecessary, it may be rejected as surplusage.—*Middleton v. Atkins et al.* - - 184

5. The statute does not require that a "petition in debt" should be signed by the plaintiff or his attorney; and if it did, the court might permit the plaintiff or his attorney to sign the petition at the return term, and such permission would be no ground for a continuance.—*Harvey v. Renfro.* - - - - 187

6. Petition in debt will lie on a negotiable promissory note discounted by the Bank of the State of Missouri. The twenty-ninth section of the bank charter was not intended to limit the remedy upon notes discounted by the bank, but to fix the liabilities of the several parties to the instrument.—*Nelson v. Bank of Missouri.* - - - - - - - - - - 219

7. Petition in debt.—Plea, that the plaintiffs were not the legal owners of the note, and issue thereon. Held: That it was not necessary for the plaintiffs to prove the partnership set out in the petition; it was admitted by the plea.—*Arthur et al. v. Pendleton et al.* - - - - - - - - - 519

8. Petition in debt. The *date* of the note was indistinct; it being uncertain whether the date was "2" or "4." The circuit court, upon inspection of the note, decided it was "4," as set forth in the petition. Held: That whether the date was "2" or "4," was a matter of inspection; and the circuit court having satisfied itself upon that point, the supreme court would not undertake to pronounce the decision erroneous, particularly as only a *fac simile* of the note was preserved in the bill of exceptions.—*Butterworth v. Ratcliff.* - - 550

9. An acknowledgment of a debt in terms as follows: "Due A. B. one hundred dollars," is a good promissory note, upon which petition in debt will lie.—*McGowan v. West.* - - - - - - - - - 569

PLEADING.

1. Petition under the act concerning "Wills," (R. C. 1835, pp. 620–1. Petitioners set forth that they are children of A., who died leaving a will, in which no mention is made of them, and that the legacies under the will have been in whole or in part paid. They pray for a distribution "according to the usages of courts of equity, and the provisions of the statute." Demurrer to the petition sustained by the circuit court. Held, that the petition was sufficient: that the authority of the circuit court to order distribution in such cases, attaches before any distribution of the estate, and, consequently, that it was not necessary to allege in the petition that the legacies had been paid, and the estate distributed.—*Levins et al. v. Stevens et al.* - - - - - - 90

2. Trespass *vi et armis* will not lie against the plaintiff in an execution for the act of the officer who levied on the plaintiff's property by the direction of the

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defendant, the latter not being present at the levy, nor in any other manner aiding the officer.—*Dameron v. Williams.* - - - - - - 138

3. The plaintiff's name in the declaration was written "Hudson," and in the writ "Hutson." Variance held immaterial.—*Cato v. Hutson.* - - 142

4. In an action to recover money won at gaming, under the provisions of the act to restrain gaming, the defendant will not be permitted to give in evidence, under the general issue, matter of defence arising subsequent to the filing of the plea. - - - - - - - - - - - - ib.

5. If the bet was made in the name of the plaintiff, the fact that others were interested with him in the bet, does not make it necessary that they should join in the suit. - - - - - - - - - - - - ib.

6. Where a bet was made with defendant's agent, who did not disclose the fact that he was acting as agent at the time of making the bet, the action to recover the money lost was properly brought against the defendant. - - ib.

7. In stating the date of a promissory note, it must be truly stated, and if the note bears no date, it may be alleged to have been made at any day; and in that case, the words "bearing date," or "dated," being descriptive words, must be omitted.—*Grantt v. Winn.* - - - - - - - - 188

8. *Nil debit* is a bad plea to an action of debt on a bond with collateral conditions.—*Parks v. the State.* - - - - - - - - - 194

9. A plea in the nature of a plea in abatement, under the act authorising that plea in cases of attachment, only denies the facts alleged in the plaintiff's affidavit as the ground of the attachment. A misnomer cannot be taken advantage of under that plea, but must be specially pleaded in abatement.—*Swan et al. v. O'Fallon & Polk.* - - - - - - - - - 231

10. If a plea professes in its commencement to answer the whole cause of action, and afterwards answers only a part, the whole plea is bad on general demurrer.—*Wimer v. Shelton.* - - - - - - - - - 237

11. A general averment, in a plea of usury, that a certain sum was for usurious interest "upon other and preceding transactions," without specifying in what way that usurious interest accrued, does not comply with the meaning of the statute, which requires the "special facts" to be stated. - - - ib.

12. On demurrer, judgment will be given against the party whose pleading was first defective in substance.—*Wimer v. Shelton.* - - - - - 266

13. In an action against the assignor of a note, not negotiable within the meaning of the statute concerning "bonds and notes," the declaration must aver the existence of some fact which, under the statute, renders the assignee liable. - ib.

14. See Contracts, 8.

15. The plea of *non est factum*, although not verified by affidavit, is a good plea to an action on a sealed instrument. The omission of the affidavit merely relieves the plaintiff from the necessity of proving the execution of the instrument; all other advantages of which a party can avail himself under that plea, are still open to him. (See Bates v. Hinton, 4, Mo. R. 78: Payne v. Snell, ib. 238.)—*Snowden v. McDaniel.* - - - - - - - - 313

16. Trespass *quare clausum fregit.* Plea, that the close, &c., was the freehold of the United States, and not the freehold of plaintiff. Held: that the plea was bad, as possession, without title, is sufficient to maintain this action against a wrong doer.—*Richardson et al v. Murrill et al.* - - - - - - 333

17. A party cannot plead any matter to a *scire facias* on a judgment, which he might have pleaded to the original action.—*Watkins v. the State.* - - 334

18. The sheriff of Gasconade county levied upon and sold certain property, as the property of M.; afterwards the judgment was reversed, and restitution of the proceeds of the sale awarded against the sheriff, who had not paid over the money. This suit was instituted by the State, to the use of M. on the sheriff's bond, to recover the money. Defendants, the securities of the sheriff, pleaded that the property levied upon was not the property of M.; to this plea there was a demurrer, which was sustained; defendants also pleaded, that M., before the rendition of the judgment, for the purpose of defrauding his creditors, had conveyed the property to one J. Verdict and judgment for M. Held: that as the judgment against M. was reversed, the inquiry into the fraud became immaterial.—*Smithers et al. v. the State, to use of Morris.* - - - - - 342

19. Where an immaterial issue, tendered by the plaintiff, was found for the defendant, and it appeared from the record, that the awarding a repleader was

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not necessary to effect substantial justice between the parties, the court properly gave judgment for the plaintiff, *non obstante veredicto.*—*Shreve v. adm'r. of Whittlesey.* - - - - - - - - - - - 473

20. It is not necessary to entitle a plea in any court, as the plea will be considered as having reference to the declaration, which must necessarily be in the same court as the plea; but if the plea is entitled in the "county court," it will not be considered as having reference to a declaration filed in the "circuit court."—*Mattingly v. Cine.* - - - - - - - - - - 499

21. A party in declaring on an agreement may set it out according to its legal effect, and is not bound to use the very words of the instrument; but if he undertakes to set out the contract according to its legal effect, he must do so in direct terms, and not by way of inuendo.—*Pye v. Ritter.* - - - - - 543

22. Where a party undertakes to convey land upon the performance of a particular act—as the payment of money—it is not necessary to aver, in a declaration on the covenant, a demand for a deed. - - - - - - ib.

23. It is a general rule, that in declaring on written instruments, it is sufficient to set out their legal effect; and in ascertaining their legal effect, reference will be had to the presumed intention of the parties. Therefore, where M., together with others, executed a note payable to himself or order, and afterwards endorsed the note to C., it was held to be the promissory note of M., and that C. might declare in debt against M. alone, as the maker of the note, and that it was not necessary to aver any consideration in the declaration.—*Millarow v. Caldwell* - - - - - - - - - - - - 563

24. A plea in bar waives all matters in abatement, and a defendant cannot set them up after having answered to the merits of the action; therefore, where the plaintiff's demurrer to the defendant's plea in abatement was sustained, and the defendant then plead in bar, it was held that the defendant waived the matter in abatement.—*Fugate v. Glascock.* - - - - - - 577

POSSESSION.

1. See Forcible Entry and Detainer, 1, 2, 4.
2. " Trespass, 3.
3. Where one is in possession of a part of a tract of land, the whole of which is his own property, the possession of a part is the possession of the whole; otherwise, where he is a mere trespasser, in which case his possession is bounded by his actual occupancy.—*Kincaid v. Logue.* - - - - - - 166

PRACTICE.

1. It is error to enter judgment against a party who has not been served with process, and does not answer to the action.—*Buxom, impleaded with Mylius, v. Young.* - - - - - - - - - - - 1

2. Where replications are not filed within the time prescribed by the statute, and no objections are made to the filing of them after that time, and no motion made for a judgment of non suit; after verdict for plaintiff, it is too late to raise the objection.—*Meglehan v. Orme and Speers.* - - - - - - 4

3. Unless all of the testimony is preserved in a bill of exceptions, this court will presume that the judgment of the circuit court, in the admission or exclusion of evidence, is correct. - - - - - - - - - ib.

4. If a party, by negligence, suffers a judgment by default to go against him, it will not be set aside to admit a defence which the party might have made had he used due diligence.—*Wimer v. Morris.* - - - - - - 6

5. The courts of this State will not, ex-officio, take notice of the laws of sister States.—*Hite v. Lenhart, et al.* - - - - - - - 22

6. Surprise in matter of fact, when due diligence has been used, may be good cause for a new trial, but not surprise in matter of law. - - - - - ib.

7. Something more than a mere affidavit of *merits* is necessary, in this State, to authorize the circuit court to set aside a judgment by default. The "good

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cause," required to be shown, must not only be a meritorious defence, but the exercise of all due diligence by the party.—*Greene v. Goodloe.* - - 25

8. A variance between the declaration and the instrument sued on, in the date of the latter, is cured by verdict. After a verdict, the presumption is, that the proof corresponded with the averment in the declaration.—*Warne v. Anderson and Thompson.* - - - - - - - - 46

9. In an action against the acceptor of a bill of exchange, it is not necessary to prove his hand writing, unless it is denied by a plea verified by affidavit. - ib.

10. See Appeal, 2

11. The error of law alluded to in the second section of the act regulating "Practice at Law," (R. C. 1835, p. 470) on a motion for a second new trial, must be a misconception of the instructions of the court, or of the general law governing the case, (where no instructions have been given,) or an entire disregard of such instructions, which must be inferred from by a comparison of the verdict with the facts in evidence.—*Hill v. Deaver.* - - - - - 57

12. But where there is conflicting testimony submitted to the jury, and the facts found are supported by the testimony, there is no ground for supposing a misapprehension or perversion of the law, and consequently no ground for a second new trial. - - - - - - - - - ib.

13. Where the issues are submitted to the court, and its verdict is against the evidence, the judgment will be reversed.—*Scott v. Brockway.* - - 61

14. See Contracts, 5.

15. The circuit courts may, in the exercise of the discretion with which they are entrusted in regard to the relaxation of the rules of evidence, allow the parties to a case to introduce testimony out of its order. But this discretion is to be exercised in furtherance of justice, and in a manner so as not to encourage the tampering with witnesses, to induce them to prop a cause whose weakness has been exposed.—*Rucker v. Eldings.* - - - - - - 115

16. After the plaintiff has closed his evidence, the defendant has a right to the opinion of the court on the plaintiff's case, and the court cannot refuse the defendant's instruction on the allegation of the plaintiff, that he intends to give further evidence, by examining the defendant's witnesses. The plaintiff, on the cross-examination of a witness, cannot give evidence in chief, or such evidence as should have been produced to establish his cause of action. - - ib.

17. Where the rules of evidence, in the progress of a cause, have been relaxed in favor of one party, the other party has no right on that account, to disregard them. Every application for a relaxation of the rules must stand upon its own merits, without regard to what has previously been done. These principles, however, are only applicable on the supposition that the court rigidly enforces its rules, for where, by remissness in their enforcement, a disregard of them has been engendered, it would be unjust to permit one party to disregard the rules, and arbitrarily enforce them against the other party. - - ib.

18. If there be no testimony whatever on a particular point, it is unnecessary for the court to inform the jury of that fact.—*Neal v. McKinsey.* - 128

19. See instructions, 1.

20. In an action of trespass under the statute, a general verdict will be decreed for single damages, unless the contrary appears.—*George v. Rick.* - 149

21. Where the summons varies from the declaration, the court may permit the former to be amended, and it is no ground for a countenance. A variance between the declaration and the writ cannot be taken advantage of, on a motion to quash.—*Jones v. Cox, et al.* - - - - - - - 173

22. It will not avail a party merely to *object* to the decision of the court. He must *except* also, and the exception must appear upon the record.—*Skelton v. Ford, et al.* - - - - - - - - - 209

23. To entitle a party to the benefit of objections to any proceeding in the circuit court, it should appear upon the record that the same objections were made in that court.—*Steamboat Thames v. Erskine & Gore.* - - - 213

24. The circuit court having opportunities greatly superior to those enjoyed by the supreme court, of determining whether a verdict is against the weight of evidence, and where a new trial should be granted, its judgment will not be reversed for refusing to grant a new trial on the ground that the verdict was

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against the weight of evidence, unless a very flagrant case be made out.—*Lackey v. Lane & McCabe.* - - - - - - - - - 220

25. Where no objections were made to the reading of depositions until they were offered in evidence, and then they were objected to on the ground that there was no proof that the witnesses were not within the reach of the process of the court, the court very properly allowed that objection to be removed by the introduction of other testimony —*Lepper v Chilton.* - - - - 221

26. A new trial will not be granted unless the motion for the new trial in the circuit court, and the grounds upon which it is asked, are preserved in a bill of exceptions. *Benoist & Hackney v. Powell & Wilson.* - - - - - - - 224

27. The evidence and proceedings in a cause cannot be reviewed by the Supreme Court, unless they are preserved in a bill of exceptions. (See Butcher v. Keil & Butcher, 1 Mo. R., 262; Davis v Hays, ib 270; Alexander v. Hayden, 2 Mo R., 211; Bartlett v. Draper, 3 Mo. R., 487; County of Boon v Corlew, ib., 12; Foster v. Nowlin, 4 Mo. R., 18; Coleman v. McKnight, ib., 83; Richardson v. Harrison, ib., 232; Davidson v Peck, ib., 439; Swearingen v. Newman, ib., 456; Withington v. Young, ib., 564; Searcy v. Devine, ib., 626; Hughes v. Ellison, 5 Mo. R., 110; Pratt v. Rogers, ib., 5 ; Thompson v. Child, 6 Mo R., 16 ; Gale v. Pearson, ib., 253; Magehan v. Orme & Speers, 7 Mo. R., 4; Shelton v Ford and others, ib., 209; Benoist & Hackney v. Powell & Wilson ib., 224.)—*Crane v. Taylor.* - 285

28. A verdict found upon conflicting testimony will not be disturbed.—*Rennick v. Walton.* 292

29. The Supreme Court will presume that the circuit court decided correctly, unless the contrary appears from the facts and proceedings preserved in the bill of exceptions.—*Ingram v. The State.* - - - - - - - - - 293

30. Defendants executed their note to plaintiffs, describing them in their note, as "surviving partners of J. B & M Camden & Co." Held to be a mere *descriptio personarum*, and unnecessary to be inserted in the declaration.—*Freeman et al. v. Camden.* - - - - - - - - - - - - 298

31. A variance between the writ and declaration cannot be reached by a motion to quash the the writ (See Jones v. Cox, ante 173.) - - - - - - ib.

32. After the court has given judgment on demurrer, the same matter is never allowed to be urged in arrest of judgment. - - - - - - - - ib.

33. Where the declaration is defective in the omission of an averment without proving which the jury ought not to have found a verdict for the plaintiff, such defect is cured by verdict, and therefore cannot be taken advantage of by motion in arrest of judgment.—*Frost v. Prior.* - - - - - - - - - 314

34. When final judgment is rendered in a cause, and that judgment is erroneous, it may, during the term at which it was rendered, be set aside; but when the term is past the control of the court ceases, and no alteration or amendment can be made, but such as is authorised by the statutes of joefails or amendments.— *Ashby v. Glasgow.* - - - - - - - - - - - - - 320

35. The circuit court has no power to quash the writ, and dismiss the suit, because bail was improperly required in an action commenced by capias.—*Lyon et al. v. Harlow et al.* - - - - - - - - - - - 34b

36. The act of 14th January, 1839, allowing a party to dismiss his suit in vacation, not containing any provision respecting the preservation of the evidence of such dismissal, the circuit courts may provide by rule for the preservation of such evidence. In the absence of any such rule, the entry of the clerk in a book kept by him for that purpose, or on a paper filed in the cause, would be sufficient evidence of such dismissal —*Shoults v. Baker.* - - - - - - - - - 350

37. A writ of error will not lie on a judgment of non-suit; but the party must move to set aside the non-suit, and preserve the evidence and proceedings in the cause in a bill of exceptions.— *Atkinson v. Lane.* - - - - - - - - 403

38. The 1st Sec of the Act of Feb. 13, 1839, providing, that in actions founded on contract, and instituted against several defendants, the plaintiff may have judgment against such of the defendants as shall have proven to be parties to the contract, is applicable to suits against partners, where a note has been executed by one, in the name of the firm, without the express or implied authority of the other.—*Finney et al. v. Allen.* - - - - - - - - - - - 416

39. The judgment of the circuit court, will not be reversed on account of an erroneous instruction, when it is apparent from the record, that such instruction could not have been prejudicial to the party complaining. - - - - - - ib.

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40. The refusal of a correct instruction, and accompanied with any exposition of the law of the case to the jury, is error.—*Christy v. Price, Adm'r. of Fugate.* - 430
41. It is the province of the jury to determine what credit is due to the testimony of a witness, and the court will not set aside the verdict, unless it is clearly against the weight of evidence.—*Henry v. Forbes.* - - - - - - - 455
42. A gave his notes for the payment of the purchase money of a certain tract of land, and at the same time, the payee agreed, under seal, that if there should be any suit concerning the land, the notes should not be paid until the same had been "entirely got rid of and cleared away," and then the expenses of the suit were to be deducted from the notes Held: that this agreement could not be set up in bar to a suit on the notes, as it did not amount to a defeasance or a release. The party aggrieved had his action on the covenant.—*Bircher v. Payne.* - - - 462
43. Although it is not stated in the bill of exceptions, that no other evidence, than that recited, was given, &c. Yet, if it can be clearly inferred from the proceedings, that no other evidence was given, it is sufficient.—*Gamble. Adm'r. v. Hamilton, Adm'r.* - - - - - - - - - - - - 469
44. Where a party seeks to consolidate suits on accounts, and to dismiss the suit so consolidated for want of jurisdiction in the justice, and appeals from the decisions of the justice against him thereupon, he will be held to strict proof of the pendency of the several suits before the justice.—*Sykes v. Planter's House.* - - 477
45. The right of counsel to commence or conclude an argument to a jury, depends on the practice and discretion of the circuit courts; and such practice and discretion will not be revised or controlled by the supreme court.—*Wade v. Scott.* - - 509
46. If there is any evidence given from which the jury might infer a particular fact, its sufficiency to establish such fact must be determined by the jury.—*The State to use of, &c. v. Woods, et al.* - - - - - - - 536
47. The first section of the sixth article of the act concerning "Practice at Law," leaves the power of amendment somewhat to the discretion of the circuit court, and this discretionary power will not be controlled by the supreme court, unless some good will result therefrom. Therefore, where the circuit court refused to permit the plaintiff, on the trial, to amend his declaration in a material respect, the supreme court refused to interfere.—*Long v. Overton et al.* - - - 567
48. A party cannot take advantage of an error in his own favor.—*McGowen v. West.* 569
49. See Averment, 2.
50. A party who seeks to reverse the judgment of the circuit court for refusing to grant him a new trial, where all the instructions asked by him were given, must make out a case free from doubt.—*Bobb v. Lambain & Bennett.* - - - - 601
51. It is error to instruct the jury that they are judges of the law and the evidence. The jury are to decide according to the evidence, as they receive it from the witnesses, and the law as delivered to them by the court.—*Hardy v. The State.* - - 607
52. The circuit court should not permit juries to take law books to their room for the purpose of investigating the law of the case; but they may be permitted to take a law book in their retirement, when the paragraph applying to the case is separately marked out, as in the case of a statutory provision. - - - - ib.

PRESUMPTIONS.

See Slaves, 1.

PRINCIPAL AND AGENT.

1. An agent is a competent witness to prove contracts made by him, on the part of his principal.—*Southard v. Auld et al.* - - - - - - - - 318
2. An authority to purchase articles on credit, must imply a power in the agent, to acknowledge indebtedness in the name of the principal. A recognition, by the principal, of the agency, in the particular instance, or in similar instances, is evidence of the authority of the agent. - - - - - - - - ib.
3. An agent appointed for a particular purpose, and acting under defined powers, cannot bind his principal by any act beyond his authority. Thus, where the authority was to draw upon the principal a bill of exchange at four months, and the bill drawn was antedated so as to become payable in less than four months, the

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principal was not bound —*Tate et al. v. Evans et al.* - - - - 419

PUBLIC LANDS.

1. An improvement on public lands is not subject to execution. It is not such an interest in land as is contemplated by the act regulating executions.—*Hatfield v. Wallace.* - - - - - - - - - - 112
2. To entitle a person to a pre emption under the act of Congress for that purpose, he must be either twenty-one years of age, or the head of a family.—*Ely v. Elvington.* - - - - - - - - - - - - 302
3. See Trespass, 5.
4. " Patent, 1-2-3.

RECORDS.

A party will be heard in relation to a matter in which he is contradicted by the record.—*Weber v. Schmeisser.* - - - - - - - - 600

RIGHT OF PROPERTY.

See Constables, 3.

SCIRE FACIAS.

A party cannot plead any matter to a *scire facias* on a judgment which he might have pleaded to the original action.—*Withins v. The State.* - - - - 334

SECURITY.

1. An omission on the part of the State to bring suit upon an official bond, upon the default of the officer to account, for several years after the default occurred will not discharge the securities. Laches will not be imputed to the State.—*Price v. The State.* 194
2. See Evidence, 14.
3. A security may avail himself of the defence of usury, as well as the principal. An endorser for accommodation is regarded in the light of a security, and as such is entitled to avail himself of any defence which would have availed the maker.—*Wimer v. Shelton* - - - - - - - - - - - 237
4. When the security in a note—within the jurisdiction of a justice of the peace, and the payee, reside in one county, and the principal debtor resides in another county, the payee, on being served with notice to commence suit by the security, has his elect on to sue the security alone, or the principal debtor; and is not compelled to go to a distant county and sue the principal debtor alone.—*Hughes v. Gorton.* - 297
5. Mere negligence on the part of the payee in not sueing, or in giving time to the principal debtor, will not discharge the security; but if the payee has a specific lien on the property of the debtor, sufficient to satisfy the debt, and voluntarily surrenders that lien, or looses it by his own negligence, the security will be discharged —*Ferguson v. Turner.* - - - - - - - - - 497

SET-OFF.

1. The statute of set-off (R. S. 1835, p. 579,) is not restricted to natural persons, but extends to corporations, and the right of set-off exists in suits by corporations before justices of the peace —*City of St. Louis v. Rogers.* - - - - - 19
2. A note transferred by delivery, for a valuable consideration, may be the subject of set-off. The transfer or assignment need not be in writing.—*Frazier et al. v. Gibson.* - - - - - - - - - - - - 271
3. Where an administrator takes a note for money of the estate loaned, in which note he is named A. B., administrator, &c., the individual debts of the administrator may be set-off against the note.—*Lacompte v. Seargent.* - - - - - 251

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4. In suit by assignee of a note payable "without defalcation," but not negotiable like an inland bill of exchange, for want of the words "negotiable and payable," the payor cannot plead a set-off, though he may plead a total failure of consideration.—*Maupin et al. v. Smith.* - - - - - - - - - 402
5. A note given for a certain sum, payable in *work*, cannot be set-off in an action founded on a debt due in money; although the debt accrued for the same kind of work stipulated for in the note.—*Prather v. McEvoy to use of Nelson.* - - 598

SHERIFF.

See Escape.

SHERIFF'S DEEDS.

1. A deputy sheriff may execute a deed for land sold under execution, but it must be in the name of his principal.—*Evans v. Wilder.* - - - - - 359
2. A became the purchaser of land at sheriff's sale, while the act of 28th June, 1821, for the relief of debtors and creditors, was in force. In pursuance of that act, a certificate of purchase, signed by the deputy sheriff, was given to the purchaser. A judgment creditor redeemed the land, and took a deed for the same, dated 26th May, 1825, and executed by the successor in office of the former sheriff. The act of 28th June, 1821, was repealed 11th January, 1822, with a saving of the validity of all proceedings had under the same before the repealing thereof. Held; That the certificate of purchase, given by the sheriff under the act of 28th June, 1821, did not authorise his successor to execute the deed, for that could only be done by petition to the circuit court; but even if the sheriff had been so authorised, yet the certificate of purchase being signed by the deputy sheriff in his own name, was void. - - - - - - - - - - ib.
3. A sheriff selling land under execution, must describe the land with such certainty, that it may be known what specific land is offered for sale, and where it lies. A sheriff's deed describing the land sold, as "three and one-half eights of the Boonville tract situated in Cooper county on the south side of the Missouri river," is not void for uncertainty in the description (Scott, Judge, dissenting.)—*Hart v. Rector.* - - - - - - - - - - 531

SHERIFF'S SALES.

1. See Pleading, 18.
2. When more property is sold by a sheriff, under execution, than is sufficient to satisfy the execution, and the property could have been sold in parcels, the court will set aside the sale on motion, but the motion must be made by a party, whose rights are effected by the sale.—*Hicks et. al. v. Perry.* - - - - - 346
3. See Lien, 2.

SLANDER.

In slander, although the words proved are equivalent to the words charged in the declaration, yet not being the same in substance, an action cannot be maintained; and although the same idea is conveyed in the words charged, and those proved, yet if they are not substantially the same words, though they contain the same charge, but in a different phraseology, the plaintiff is not entitled to recover.—*Berry v. Dryden.* - - - - - - - - - - 324

SLAVES.

1. In all the slaveholding states, *color* raises the presumption of slavery, and, until the contrary is shown, a person of color is deemed to be a slave.—*Rennick v. Chloe.* - - - - - - - - - - - 197
2. A statute of a slaveholding state, authorising persons to dispose of their property by will, will not be construed as conferring a power to emancipate slaves. The

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power to emancipate slaves, in another slaveholding state, must be shown to exist by the laws of that State, and if not so shown, the courts of this State, will presume that no such power exists. - - - - - - - 197

3. See Warranty, 2.

SPANISH GRANTS.

1. The treaty by which Louisiana was acquired, imposed only a political obligation upon the government of the U. S. to perfect the titles, rights and claims originating under the former government. The treaty itself did not, as in the case of the Florida purchase, operate as a confirmation. This political obligation, sacred as it is, cannot be enforced by the judicial tribunals.—*Heirs of Mackay v. Dillon.* 7

2. When the government exercises its powers, and confirms the land to one claimant, it must necessarily be to the extinction of any mere inchoate title in another. The oldest confirmation, like the oldest patent, must prevail, at least in ejectment. ib.

3. The act of Congress of June 13th, 1812, confirmed the claim of the inhabitants of St. Louis to the commons adjoining that town, and that act of confirmation embraced the commons as defined in the survey of 1806. Therefore, a party claiming under the inhabitants of St. Louis, must prevail over a party who claims under a title confirmed by the act of 4th July, 1836. - - - - - - ib.

4. Plaintiff claimed under, 1st, A concession from the Lt. Gov. of Upper Louisiana, dated 26th Nov. 1801, founded on a former grant alleged to have been made in 1787 by the then Lt. Gov. of U. L. 2d, The proceedings of the board of commissioners, under the act of Congress of 1832 and 3, confirming said claim. 3d. The act of 4th July, 1836, and a survey by the U. S. under said act. The premises in controversy were part of the St. Charles commons, and defendant claimed under the inhabitants of that town. The court adhere to the decision made in Bird v. Montgomery, (6 Mo. R. 510,) viz: The confirmation by the act of 4th July, 1836, cannot prevail over the previous confirmation to the inhabitants of St. Charles by the act of 13th June, 1812.—*Chouteau v. Eckert.* - - - - - - 16

5. In 1799, Pierre Chouteau petitioned the Lt. Gov. of Upper Louisiana to grant him 30,000 arpents of land on the Missouri river, 60 miles above the mouth of the Osage so as to include the river Lamine, and some salt springs. De Lassus, the Lt. Gov. granted the petition on the 20th Oct. 1799, and directed that the surveyor general should survey the land when Chouteau desired it, reserving the right of the Intendant General to confirm the title. Held: That this concession of the Lt. Gov. was a permission to Chouteau to appropriate the said land, and could not effect a severance of the land specified, from the King's domain, until an actual survey was made, as the survey alone appropriates land. This concession of grant, without any survey under the Spanish authorities, is not such a grant as is contemplated by our act regulating the action of ejectment.—*Ashley et. al. v. Cramer.* - - - 98

6. The action of the board of commissioners, under the act of Congress of July 9th, 1832, recommending this claim for confirmation, is not such "a confirmation made under the laws of the United States," as is contemplated by the statute of the State regulating the action of ejectment. That board had no power to confirm any claim whatever. The action of the board, however, upon this claim, comes, within the meaning of the 7th section of the act concerning evidence. - - ib.

7. The plaintiffs, to bring their claim within the provisions of the act of Congress of July 4, 2836, confirming the proceedings of the board of commissioners, offered in evidence extracts from the minutes of the board, containing their proceedings on this claim in 1833, certified by the recorder of land titles to be truly transcribed from the minutes of the board, and on file and of record in his office. Held, that as this evidence did not show under what power the commissioners acted, or whether this was one of those decisions reported to the general land office, the proof was of too loose and indefinite a character to raise even a presumption in favor of the claim of the plaintiffs, and it was therefore properly considered by the circuit court as insufficient to make out a confirmation under the laws of the United States. ib.

8. The act of Congress of July 4, 1836, is a legislative grant, and parts with all the interest of the United States in the confirmed claims. This legislative grant or confirmation is equivalent to a patent, and requires no further action on the part of the United States to perfect the title. The entire and absolute property passes from the general government and vests in the confirmees, by virtue of the act. ib.

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9. The act of July 4, 1836, makes no provision for issuing any patent, or other evidence of title, to the claimants under that act, and there being no law of the general government authorising the issuing of such patents, the patents issued to claimants under said act are void.—*Ashley et al. v. Cramer.* - - - - 98

10. Ejectment: Plaintiff claimed by settlement and cultivation prior to 20th Dec. 1803, under the acts of Congress of 2nd March, 1805, and 13th June, 1812, and a confirmation by the act of 4th July, 1836. Defendant claimed likewise by settlement and cultivation prior to the 20th Dec., 1803, and under the acts of 2d March, 1805, and 13th June, 1812, and a confirmation by the act of 29th April, 1816. Neither claim was confirmed by metes and bounds. Upon the trial the court permitted the plaintiff to prove that the settlement of M., under whom defendant claimed, was not within the lines of the survey consequent upon plaintiff's confirmation, but was two miles off. Held: That this evidence was properly admitted, as the act of 2nd March, 1805, provides, that the confirmation under it shall be for such lands as were actually inhabited and cultivated by the claimant.—*Moss v. Anderson.* - - - - - - - - - - 337

11. Ejectment. Plaintiff claimed under a patent from the United States, dated 15th June, 1826. The defendant claimed under the act of Congress of July 4th, 1836. Held: that as the latter act expressly excepted lands that had been surveyed and sold by the United States, the patent; whether valid or not, must prevail against the defendant, claiming under the act of Congress. The act of July 4th, 1836, was clearly a gratuity, and as such, Congress chose to prescribe the terms on which their bounty could be obtained.—*Sarpey v. Papin.* - - - - - 503

STATUTE OF FRAUDS.

1. Defendant sold a lot of ground to A. and gave his bond for a conveyance on payment of the purchase money. Subsequently a judgment was rendered against A. on his note to B., in which defendant was security. An execution was issued against A. on the judgment, and defendant knowing himself to be ultimately bound for the debt, and being informed that no property belonging to A. could be found, desired the sheriff to levy the execution on said lot, and that defendant would see that the title should be made good to the purchaser. Complainant relying on the promise of defendant, became the purchaser of the lot at sheriff's sale. Complainant prayed for a conveyance of the legal title, refusing to pay to defendant the purchase money, or any part thereof due defendant by A. Held: that the promise of defendant, being verbal, was within the statute of frauds, and that complainant could not obtain a conveyance of the legal title without paying to defendant the purchase money.—*Bryan v. Jamison.* - - - - - - 106

2. A proposition in writing, accepted by the other party, to sell "all that piece of property known as the *Union Hotel Property*," held not to be a sufficient description of the property to take the case out of the operation of the statute of frauds, it being uncertain what property was comprehended in the words, "Union Hotel Property," without resorting to parol testimony.—*King adm'r. of King v. Wood.* 389

3. A parol promise, that if plaintiff would give B. time on a judgment obtained against him, defendant would see the judgment paid, is a collateral undertaking to pay the debt of another, and within the statute of "contracts and promises."—*Musick v. Musick* - - - - - - - - - - 495

4. A person making a parol contract to convey lands, may or may not insist on the protection of the statute of frauds. If he will confess the agreement, and not insist on the statute, its performance will be enforced against him.—*McGowan v. West.* - - - - - - - - - - - 569

ST. CHARLES COMMONS.

See Spanish Grants, 4.

ST. LOUIS COMMONS.

1. The act of Congress of June 13, 1812, confirmed the claim of the inhabitants of St. Louis to the commons adjoining that town, and that act of confirmation embraced the commons as defined in the survey of 1806. Therefore, a party claiming

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under the inhabitants of St. Louis, must prevail over a party who claims under a title not confirmed by the act of 4th July, 1836.—*Heirs of Mackay v. Dillon.* - 7

TENDER.

A tender made in bank bills is good, unless it is objected to for the reason that it is so made.—*Williams v. Rorer.* - - - - - - - - - 556

TRANSCRIPT.

See Lien, 2 and 3.

TRESPASS.

1. Trespass *vi et armis* will not lie against the plaintiff in an execution for the act of the officer who levied on the plaintiff's property by the direction of the defendant, the latter not being present at the levy, nor in any other manner aiding the officer.—*Dameron v. Williams.* - - - - - - 138
2. In an action of trespass under the statute, a general verdict will be decreed for single damages, unless the contrary appears—*George v. Rook.* - - - - 149
3. A. delivered the key of his house to B., not with the view to put the former in possession of the house, but only of the property therein contained. Held, that B had not such a possession as would enable him to maintain trespass for breaking and entering the house.—*Davis v. Wood.* - - - - - - - 162
4. In trespass all are principals, and those who direct a trespass, or assent to a trespass for their benefit after it is done, are equally liable with those who actually commit it.—*Canifax v. Chapman and Wills.* - - - - - - 175
5. A plea in trespass *quare clausum fregit*, that the close, &c., was the freehold of the United States, and not the freehold of the plaintiff. Held: that the plea is bad, as possession, without title, is sufficient to maintain this action against a wrong doer.—*Richardson et al v. Murrill et al.* - - - - - - 333
6. A person who enters upon the land of the United States, and keeps possession without any valid claim or title, is a trespasser, and may be sued in trespass quare clausum fregit, by a purchaser from the United States, for an injury to the freehold, after the purchase.—*Gale v. Davis.* - - - - - - - - 544

TROVER.

In trover, the plaintiff must show some property in himself, either general or special. Where the evidence establishes that the subject matter of the suit was not property, either of the plaintiffs or any one else, it is a complete answer to the action.—*Chouteau and Keizer v. Hope.* - - - - - - - - - 428

USURY.

1. A general averment, in a plea of usury, that a certain sum was for usurious interest "upon other and preceding transactions," without specifying in what way that usurious interest accrued, does not comply with the meaning of the statute, which requires the "special facts to be stated.—*Wimer v. Shelton* - - - - 237
2. A security may avail himself of the defence of usury, as well as the principal. An endorser for accommodation is regarded in the light of a security, and as such is entitled to avail himself of any defence which would have availed the maker. - ib.

VARIANCE.

1. A variance between the declaration and the instrument sued on, in the date of the latter, is cured by verdict. After a verdict, the presumption is, that the proof corresponded with the averment in the declaration.—*Warne v. Anderson and Thompson.* - - - - - - - - - - 46

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2. The plaintiff's name in the declaration was written "Hudson," and in the writ "Hutson." Variance held immaterial.—*Cato v. Hutson.* - - 142
3. Where the summons varies from the declaration, the court may permit the former to be amended, and it is no ground for a continuance. A variance between the declaration and the writ cannot be taken advantage of, on a motion to quash.—*Jones v. Cox, et al.* - - - - - - 173
4. Assumpsit on a bill of exchange. The declaration described the bill as being drawn by "George A. Cook," under the name of "G A Cook." On the trial the plaintiff offered in evidence a bill drawn by "G. W. Cook." Held, that the variance was material. It was, perhaps, unnecessary to set out the middle name, or initial letter of the middle name, but having done so as a description of the instrument, it became material as a descriptive averment —*King v. Clark.* - - 269
5. The omission of the initial letter of a middle name is not a misnomer or variance.—*Smith v. Ross & Strong.* - - - - - - - 463
6. A middle letter between the christian and surname, is no part of the name, consequently its omission, or a mistake in its description, is immaterial.—*Orme v. Shephard.* - - - - - - - - - - - 606

VENUE.

See Criminal practice, 6.

WARRANTY.

1. See Evidence, 33.
2. Plaintiff sold to defendant a slave with a written warranty, that he was sound, "with the exception of a small defect in his hands." It appeared that the slave's hands were in such a condition, as to render him almost worthless to the purchaser: Held, that this was such a misrepresentation of the extent and violence of the disease, as amounted to a breach of the warranty, and might be given in evidence, in an action for the stipulated price of the slave, in diminution of such price.—*Wade v. Scott.* - - - - - - - - - - 509

WILLS AND TESTAMENTS.

1. See Pleading 1
2. The statute concerning "Wills," (R. C. 1835, p. 617,) requires that the subscribing witnesses to a will should attest not only the corporal act of signing, but the sanity of the testator at the time of signing. Proof by one of the subscribing witnesses only, that the testator was of sound mind, is insufficient.—*Withington et al. v. Withington.* - - - - - - - - - - 589

WITNESSES.

Whenever the credit of a witness is to be impeached by proof of any thing he has said, or declared, or done in relation to the cause, he is first to be asked upon cross examination, whether he has said, or declared, or done that which is intended to be proved.—*Able and Isbell v. Shields et al.* - - - - - - 120

WRITS.

The 19th section of 5th article of the constitution, and the 10th section of the 2nd article of the act relating to justices' courts, directing that all writs and process shall run in the name of the "State of Missouri," are merely directory, and neither expressly makes void a writ not in conformity with its provisions. If the defendant appears and answers to the action, any defect in the writ, in this respect, will be cured (Charless v. Marney, 1 Mo. R. 537; Fowler v. Walton, 4 Mo. 27; Little v. Little, 5 Mo. R. 227; Overruled on this point.)—*Davis v. Wood.* - - 162

WRIT OF ERROR.

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1. A writ of error will not lie on a judgment of non-suit; but the party must move to set aside the non-suit, and preserve the evidence and proceedings in the cause in a bill of exceptions.—*Atkinson v. Lane.* - - - - - - 403
2. A writ of error will lie upon an order of the county court, that an administrator "retain all the money of the estate, which may come into his hands, subject to the order of the court, for the purpose of paying all administrators and guardians, such sums as shall be found due from the estate, &c., in preference to all other demands, &c." Such an order amounts to a judgment, and is final and conclusive in its nature.—*Gamble. adm'r, v. Hamilton, adm'r.* - - - - 469